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IN THE

Supreme Court of the United States

OCTOBER TERM, 1953.

No. 632

PENNSYLVANIA WATER & POWER COMPANY,
Petitioner,

v.

CONSOLIDATED GAS ELECTRIC LIGHT AND POWER COMPANY OF BALTIMORE,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT.

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PETITION FOR WRIT OF CERTIORARI.

Pennsylvania Water & Power Company (Penn Water), a Pennsylvania corporation, prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Fourth Circuit (R., Vol. III, pp. 2-9), affirming a judgment of the District Court for Maryland (a) dismissing Penn Water's suit for damages under the federal antitrust laws against Consolidated Gas Electric Light and Power Company of Baltimore (Consolidated), a Maryland corporation, and (b) denying Penn Water's motion for interlocutory summary judgment that Consolidated was liable to Penn Water under such laws.* (R., Vol. I, p. 8.)

Both Courts below found in Penn Water's favor on all the basic allegations of Penn Water's complaint and motion for summary judgment, namely that Consolidated, in exercising contractual controls in violation of the federal antitrust laws, had prevented expansion of its competitor, Penn Water, by prohibiting Penn Water from building an addition to its steam electric generating plant and associated facilities, thus causing substantial damage to Penn Water.

However, the Courts below, in reliance upon a few early lower court cases, denied recovery to Penn Water on the sole ground that Penn Water originally signed the illegal contract and was therefore *in pari delicto*. The Courts so held notwithstanding that (a) Penn Water signed the contract when under domination of persons in control of Consolidated and, (b) after the domination terminated, Penn Water repudiated and resisted the subsequent illegal acts of Consolidated causing Penn Water's damage whereas Consolidated insisted upon illegally preventing Penn Water's expansion and threatened damage claims for noncompliance.

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* The suit was brought under Section 7 of the Sherman Act (26 Stat. 210) and Section 4 of the Clayton Act (15 U. S. C. §15). The motion for summary judgment was made under Rule 56(c), and left the amount of damages to be determined by subsequent trial.

Thus the sole issue in this case is one of law, namely whether, contrary to the plain wording of the Sherman and Clayton Acts and the principles stated in decisions of this Court and the Courts in other circuits, the defense of *in pari delicto* is a bar to recovery in any antitrust damage suit, or in any event, is a bar to recovery in an antitrust suit of damages resulting from illegal acts of the defendant which the plaintiff repudiated and resisted.

Section 7 of the Sherman Act (26 Stat. 210) provides *unqualifiedly* that *any* person injured by *any other* person by reason of *anything* forbidden in the Act may recover damages for injury to his business or property. Congress deliberately left this right to recover damages unqualified. Thus, when it enacted the statute, it rejected several proposed bills containing the defense of *in pari delicto*. Section 4 of the Clayton Act (15 U. S. C. §15) similarly has no limitation on the right of anyone injured to recover damages for anything forbidden in the antitrust laws.

The decision below is also in conflict with the principle re-enunciated in three recent decisions of this Court* that the defense of *in pari delicto* is not available in antitrust damage suits because of the public policy of the antitrust laws to encourage such suits as a deterrent to future violations. This Court has never denied recovery of damages under the antitrust laws on the ground that the plaintiff was *in pari delicto*.

The decision below also conflicts with decisions of the Court of Appeals in the Tenth Circuit, and decisions of the District Courts in the Second, Fifth and Ninth Circuits, all interpreting the three recent decisions of this Court as rejecting the defense in antitrust damage suits. These decisions emphasize and sustain the doctrine that the antitrust damage suit is not a private suit, but a public action in its nature and that private considerations are out of place in an antitrust damage suit. The decision below is

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* *Kiefer-Stewart Co.* v. *Joseph E. Seagram & Sons, Inc.*, 340 U. S. 211 (1951); *Mandeville Island Farms, Inc.* v. *American Crystal Sugar Co.*, 334 U. S. 219 (1948); and *Moore* v. *Mead Service Co.*, 340 U. S. 944 (1951).

also in conflict with earlier decisions in the Sixth and Eighth Circuits.

This conflict with the Sherman and Clayton Acts and the principles enunciated in antitrust decisions of this Court and of the Courts in other Circuits call for review by this Court. (Point I).

The decision below is also in conflict with early decisions of the Courts of Appeals in the Second, Third and Fifth Circuits, decided prior to the three recent decisions of this Court referred to above. These Courts of Appeals decisions, while recognizing the defense of *in pari delicto* to some extent, permitted recovery by a plaintiff who had repudiated and did not participate in the illegal acts causing the plaintiff's damages, the situation presented here. The conflict on this point of law also makes review by this Court necessary or desirable. (Point II).

The Court of Appeals in its decision below did not discuss or even mention the public policy underlying the Sherman and Clayton Acts, the unqualified language of the Acts, or the development of the law with respect to the doctrine of *in pari delicto* in antitrust suits. The Court below simply said that the facts in the three recent decisions of this Court were different from the facts of this case, and in effect took the position that this Court had not passed on the question presented by this case. If that is so, an additional reason for review is presented because the question is one of general application relating to the scope of the antitrust laws and is of paramount importance under such laws. It should be settled by this Court. (Point III).

Opinions Below.

The opinion of the Court of Appeals is reported at 209 F. 2d 131. The District Court's opinion (R., Vol. I, pp. 1-7) is not yet reported.

Question Presented.

The sole question raised by this petition is whether, under the express wording and the public policy of the federal antitrust laws, the defense of *in pari delicto* is unavailable in a damage suit to enforce such laws (a) under any circumstances, or (b) at least, where, as here, the plaintiff resisted and repudiated the illegal acts of the defendant which caused the plaintiff's damages.

Jurisdiction.

The jurisdiction of this Court is invoked under Section 1254(1) of the Judicial Code (62 Stat. 928, 28 U. S. C. §1254).

Statement.

The underlying facts on which this case is based are *res judicata* and were all adjudicated (as held by the Courts below in the present case) in a prior litigation between the same parties, Penn Water and Consolidated, in the United States District Court for Maryland and the Court of Appeals for the Fourth Circuit. This Court denied certiorari from the decision of the Fourth Circuit in that prior litigation.* These basic facts found by the Courts in the prior case are:

The plaintiff, Penn Water, is an electric utility having hydro and steam electric generating plants (1948 capacity 134,000 kilowatts) at Holtwood, Pennsylvania, on the Susquehanna River, with transmission lines running to points in Pennsylvania and Maryland including Baltimore and a point near the District of Columbia. Penn Water sells power at wholesale or in bulk to electric utilities in

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* *Pennsylvania Water & Power Company and Pennsylvania Public Utility Commission* v. *Consolidated Gas Electric Light and Power Company of Baltimore and Public Service Commission of Maryland*, 89 F. Supp. 452 (D. Md. 1950) *rev'd*, 184 F. 2d 552 (4th Cir. 1950); *cert. den.*, 340 U. S. 906 (1950).

Pennsylvania, the Pennsylvania Railroad and the defendant, Consolidated. Penn Water also has charter rights to sell at retail in Pennsylvania and, through a wholly-owned subsidiary, in Maryland (184 F. 2d pp. 554-6).

The defendant, Consolidated, a utility company several times the size of Penn Water (1948 capacity 538,000 kilowatts), generates electricity by steam and sells electricity at wholesale, in bulk and at retail in and around Baltimore, and through the transmission network of Penn Water with which it is connected. Consolidated also has a large gas and steam utility business (184 F. 2d p. 555).

The two companies were found to be competitors in the generation and sale of electric energy through their present facilities and other facilities that might be constructed by them (184 F. 2d p. 556).

In 1931, both companies were under the dominance and control of J. E. Aldred and associates (184 F. 2d p. 557) and, under such control, entered into a long term power contract which contained absolute controls by Consolidated over Penn Water's plant expansion and over the sale and purchase of electricity by Penn Water (184 F. 2d pp. 557-8). (These were the provisions, among others, held by the Courts in the prior litigation to violate the antitrust laws and to invalidate the contract.)

Thus not only did Penn Water sign the contract while under domination and control of a third party, but it was the victim of the illegal provisions and Consolidated was the beneficiary.

But after the third-party control was dissipated in 1946, Penn Water, as the Courts found, "resented and resisted such exercise of power and authority" under the contract by Consolidated, whereas Consolidated insisted upon enforcement of the restrictive controls (89 F. Supp. p. 460; 184 F. 2d pp. 557-8). Consolidated not only insisted upon enforcement of these controls but also threatened Penn Water with claims for damages for noncompliance (R., Vol. I, pp. 53-8).

In 1948, Penn Water proposed to build an extension to its steam electric generating plant (70,000 additional

kilowatts costing over $16,000,000), "whereby coal from the [Susquehanna] river could be salvaged and power economically produced" (184 F. 2d p. 558). This Penn Water was not permitted to do under the contract, without the consent of Consolidated. Such consent was refused. In addition other disagreements had arisen between the two companies. Consolidated insisted on compliance with the contract and threatened damage claims, and on September 1, 1948, demanded arbitration of the dispute (R., Vol. I, pp. 53-8). Penn Water responded by filing a complaint in the United States District Court for Maryland on September 28, 1948 and asked in its prayer for relief that the contract be held illegal, saying:

> "(4) That the Court declare that if the Supplemental Agreement of June 1, 1931 (Exhibit 'A-2') should be construed as contended by the defendant [Consolidated], it is against public policy, is unenforceable and void." (R., Vol. I, p. 58).

Consolidated in its answer of October 15, 1948 conceded that Penn Water had attempted repudiation of the contract, stating:

> "the plaintiff [Penn Water] has endeavored to repudiate the control over it vested in the defendant [Consolidated] by said Agreement." (R., Vol. I, p. 59).

On November 23, 1948, Consolidated by letter formally prohibited the construction by Penn Water of its proposed new steam generating unit and associated facilities and itself embarked on the construction of a competing plant addition instead (184 F. 2d p. 558). Immediately thereafter Penn Water protested in writing Consolidated's action and also filed an amended and supplemental complaint in the then pending action, reiterating and expanding its complaint and stating that the contract was against public policy and in violation of the antitrust laws by reason of the restraints which it permitted and which Consolidated had exercised in prohibiting and preventing Penn Water's plant expansion.

Thereafter, Consolidated continuously and repeatedly insisted on its right to control Penn Water and to prohibit Penn Water's plant expansion despite Penn Water's continuous and repeated insistence that such control was illegal.

For example, by letter of January 7, 1949 (R., Vol. I, pp. 30-1), after Penn Water had written Consolidated vigorously objecting to its prohibition of Penn Water's expansion, Consolidated wrote to Penn Water stating:

> "We deny your right to terminate the contract. We will exercise the rights accorded to us by the contract and will fulfill the obligations thereby imposed upon us. We demand that you do likewise and that the contract be carried out by you in accordance with its terms.
>
> • • • • • •
>
> "We repeat that we demand the performance by you of all of the obligations imposed upon you in the contract."

The Court of Appeals recognized in its decision below that Consolidated had insisted upon the enforcement of the restrictive provisions of the contract and that the illegal restraints continued until January 1951.* (209 F. 2d pp. 134-5).

How, in view of these circumstances, can Penn Water be deemed in equal guilt, *in pari delicto*, with Consolidated even if that doctrine were applicable to antitrust damage suits?

The Courts below recognized that Penn Water had suffered damages as a result of the delay in building the new steam generating unit and associated facilities due to the exercise of the restraints by Consolidated. The delay increased the cost of construction and financing. In addition, Penn Water was deprived of income from the new facilities for approximately two and one-half years and

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* In January 1951 the District Court entered judgment declaring the restraints illegal and invalid under the antitrust laws after the decision of the Fourth Circuit to that effect and the denial by this Court in December 1950 of a writ of certiorari from that decision.

had the expenses of prosecuting the contract litigations, in which the illegality of the contract and a companion contract was adjudicated.* When Consolidated finally refused to make any restitution, the present suit for damages under the antitrust laws was brought (June 1952).**

REASONS FOR GRANTING THE WRIT AND ARGUMENT.

I.

The decision below is in direct conflict with the statutes and the whole trend of decisions under the antitrust laws to the effect that the defense of *in pari delicto* is not available in antitrust damage suits because of the public policy of the antitrust laws to encourage such suits as a deterrent to future violations.

(a) The unqualified language of the Sherman and Clayton Acts.

The private damage section in the Sherman Act is unqualified and does not exclude *any* person who is injured from recovering under the Act, viz.:

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* This companion contract involving Safe Harbor Water Power Corporation was also held by the courts to violate the antitrust laws because it contained contractual controls similar to those in the Penn Water contract. *Penn Water & Power Co.* v. *Consolidated Gas Electric Light & Power Co.*, 97 F. Supp. 952, (D. Md. 1951); *aff'd*, 194 F. 2d 89 (4th Cir. 1952); *cert. den.*, 343 U. S. 963 (1952).

** From the standpoint of the public interest it should be said that such restitution can not be charged against Consolidated's rate payers but only against its own surplus funds. On the other hand, Penn Water's recovery from Consolidated of the increased costs of construction of the new steam unit and associated facilities would redound to the benefit of the consumers of electric power served by Penn Water's electric utility customers in Pennsylvania and Maryland, including Consolidated, through reduction of the cost of construction of the new facilities to be included in Penn Water's rate base beginning in the spring of 1954, when the delayed facilities will begin operation.

> "Any person who shall be injured in his business or property by any other person or corporation by reason of anything forbidden or declared to be unlawful by this act, may sue therefor * * * and shall recover three fold the damages by him sustained, and the costs of suit, including a reasonable attorney's fee." 26 Stat. 210 (1890).

Clearly there is no exception here excluding a person who himself may have violated such laws, nor is there any such defense expressed elsewhere in the statute.

On the contrary, Congress rejected proposals to make a plaintiff's violation of the Sherman Act a defense. At the time the original Sherman bill was introduced in Congress, there were also under consideration alternate bills expressly providing that the plaintiff's violation of the Act would be a defense. Excerpts from these rejected bills containing a section providing for plaintiff's violation of the Act as a defense are contained in Appendix A hereto. These provisions for such a defense, as well as each of these bills, were rejected and the right to damages was given to *any* person injured by *any other* person by *anything* forbidden under the Act.*

The provisions of the Sherman Act are in contrast to state antitrust statutes then in force which contained, in addition to a damage provision, a provision making any violation of the antitrust laws by the plaintiff a defense to recovery under the damage provision. An excerpt from the Kansas antitrust statute illustrating the state statutes is also contained in Appendix A.

Again, when Congress in 1914 enacted the Clayton Act, it likewise provided without any limitation for the recovery of damages by *any* person injured by *anything* forbidden in the antitrust laws (15 U. S. C. §15).

This Court on March 8, 1954 in its unanimous decision in *Adams* v. *Maryland*, No. 271 (14 CCH Sup. Ct. Bull. 577),

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* S. 6, H. R. 509, H. R. 811, H. R. 826, H. R. 846, H. R. 202, and H. R. 3844, 51st Cong., 1st Sess. (1889-90) and S. 3476, S. 3510, H. R. 11279 and H. R. 11343, 50th Cong., 1st Sess. (1888). For the text and history of all of these bills see *Bills and Debates in Congress Relating to Trusts*, Sen. Doc. No. 147, 57th Cong., 2nd Sess. (1903).

took the position in construing a statute having similar unambiguous language that it would follow the plain meaning of the congressional enactment without reading into the statute any qualification. This Court said (p. 579):

> "The Act forbids use of such evidence 'in any criminal proceeding . . . in any court.' Language could be no plainer. Even if there could be legislative history sufficiently strong to make 'any court' mean United States courts only, there is no such history."

The unqualified language of the Sherman and Clayton Acts permitting anyone damaged to recover, whether he himself has violated the Act or not, conforms to the concept expressed by this Court and by lower Courts in other Circuits that the antitrust damage suit is essentially a public action, not a private suit, the remedy having been provided as a deterrent to violations of the Act. Consistent with that principle, private considerations have no application in an antitrust damage suit.

(b) The three recent decisions of this Court.

In three recent decisions in antitrust damage suits this Court has rejected the defense of *in pari delicto* and recognized the unqualified nature of the private damage provisions of the antitrust laws and the overriding public interest in enforcing these provisions as a deterrent to future violations. These decisions are: *Mandeville Island Farms, Inc.* v. *American Crystal Sugar Co.*, 334 U. S. 219 (1948) and *cert. den.*, 343 U. S. 957 (1952); *Kiefer-Stewart Co.* v. *Joseph E. Seagram & Sons, Inc.*, 340 U. S. 211 (1951); and *Moore* v. *Mead Service Co.*, 184 F. 2d 338 (10th Cir. 1950) rev'd 340 U. S. 944 (1951); 190 F. 2d 540 (10th Cir. 1951) and *cert. den.*, 342 U. S. 902 (1952).

In these three decisions this Court held that a plaintiff's violation of the antitrust laws is not a defense to a civil action for damages arising out of either a related or unrelated antitrust law violation by the defendant.

Statements of principle from these decisions clearly demonstrate that antitrust damage suits are provided by the antitrust laws, without limitation, as remedies to vindicate the public interest and deter prospective violations of such laws. Consistent with that principle, recovery here should not be defeated by any purely private considerations such as the defense of *in pari delicto,* even if the defense were otherwise applicable.

In the *Mandeville* case this Court reversed the decisions of the lower Courts (which had denied recovery on the ground, among others, that the plaintiff was *in pari delicto* because he signed the illegal contract which caused his damage),* and stressed the dominant policy under the antitrust laws of protecting the public interest, saying:

> "These restrictive and monopolistic effects, resulting necessarily from the practices allegedly intended to produce them, fall squarely within the Sherman Act's prohibitions, creating the very injuries they were designed to prevent, both to the public and to private individuals.
>
> "It is enough that these petitioners have suffered the injuries for which the statutory remedy is afforded. For the test of the legality and immunity of such a combination, in view of the statute's policy, is • • • whether the statute's policy has been violated in a manner to produce the general consequences • • • for particular individuals essential to the recovery of treble damages." (334 U. S. at pp. 242-3).

In the *Kiefer-Stewart* case this Court rejected the defense of *in pari delicto* (where the plaintiff had engaged in illegal price fixing related to the illegal price fixing by the defendants which injured the plaintiff), saying:

> "These grounds [of defense] raise only issues of law not calling for examination or appraisal of evidence • • • If petitioner and others were guilty of infractions of the antitrust laws, they could be held responsible in appropriate proceedings brought against them by the Government or by injured pri-

* 64 F. Supp. at p. 267.

> vate persons. The alleged illegal conduct of petitioner, however, could not legalize the unlawful combination by respondents nor immunize them against liability to those they injured. Cf. *Fashion Originators' Guild* v. *Trade Comm'n.*, 312 U. S. 457; *Mandeville Island Farms* v. *American Crystal Sugar Co.*, 334 U. S. 219, 242-243." (340 U. S. at p. 214).

Then, on the basis of its decision in the *Kiefer-Stewart* case, this Court granted certiorari to the Court of Appeals for the Tenth Circuit in the *Moore* case (where the plaintiff had been denied recovery on the ground he had "participated in an illegal undertaking [price war with the defendant] which resulted in his alleged damages", 184 F. 2d p. 340) and remanded the case to the Court of Appeals for the Tenth Circuit with a direction that it be given "further consideration in the light of *Kiefer-Stewart Co.* v. *Joseph E. Seagram & Sons.*" (340 U. S. pp. 944-5). Thereafter, that Court of Appeals reversed its prior decision and held the plaintiff to be entitled to recover in a decision, discussed in sub-point (d) below, from which this Court refused to grant certiorari.

(c) The earlier decisions of this Court were to the same effect.

The recent statements of this Court as to the public policy of the antitrust laws, making the defense of *in pari delicto* unavailable in antitrust damage suits, follow the principles enunciated in earlier decisions of this Court such as *Wilder Mfg. Co.* v. *Corn Products Co.*, 236 U. S. 165, 173-174 (1915) in which this Court unanimously said:

> "the Anti-Trust Act was intended in the most comprehensive way to provide against combinations or conspiracies in restraint of trade or commerce, the monopolization of trade or commerce or attempts to monopolize the same. * * * In other words, founded upon broad conceptions of public policy, the prohibitions of the statute were enacted *to prevent not the mere injury to an individual which would arise from the doing of the prohibited acts, but the harm to the*

> *general public which would be occasioned by the evils which it was contemplated would be prevented, and hence not only the prohibitions of the statute but the remedies which it provided were co-extensive with such conceptions."* [Emphasis supplied.]

In *Ramsay Co.* v. *Bill Posters Assn.*, 260 U. S. 501 (1923) this Court allowed recovery against the claim that the plaintiffs were *in pari delicto*, finding no support for such claim, and saying (p. 512):

> "The fundamental purpose of the Sherman Act was * * * to protect the public against evils commonly incident to destruction of competition through monopolies and combinations in restraint of trade."*

(d) The decision below is in direct conflict with the application of this Court's recent decisions by courts in other Circuits.

Following this Court's decision in the *Kiefer-Stewart* case and the remand to the Court of Appeals for the Tenth Circuit of the *Moore* case, that Court of Appeals unqualifiedly held that infractions of the antitrust laws by the plaintiff were not a defense in an antitrust damage suit, stating:

> "Although the facts in the *Kiefer* case were substantially different from those here, it was there held that in an action for treble damages under the Sherman Act, 15 U. S. C. A. §§1, 15, infractions of such law by the claimant were not a defense in such an action. We therefore conclude that the *Kiefer* case controls on this point." (190 F. 2d at p. 541).

The Tenth Circuit, unlike the Court below, thus accepted the principle underlying this Court's decision in the *Kiefer-Stewart* case, although at the same time recognizing the difference in the facts.

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* See also: *Eastman Kodak Co.* v. *Southern Photo Co.*, 273 U. S. 359 (1927), in which this Court permitted the plaintiff to recover although he had been a party to the illegal arrangements upon which he sued.

The Court of Appeals in the *Moore* case treated the plaintiff as having participated in the same "illegal undertaking" with the defendant, not in a separate infraction (184 F. 2d at p. 340). This Court denied certiorari from the second decision of the Court of Appeals in the *Moore* case, 342 U. S. 902 (1952).

Further, the District Courts in other Circuits, in their administration of the antitrust laws through the trial of antitrust damage suits, are construing such laws and this Court's decisions as precluding the defense of *in pari delicto*. This construction is entirely inconsistent with that of the Court below in this case.

In *Red Rock Bottlers, Inc.* v. *Red Rock Cola Co.*,* the Court applied this Court's decisions in the *Wilder* and *Kiefer-Stewart* cases and held that the plaintiff was not barred by the defense of *in pari delicto* where (unlike the present case) the plaintiff's conduct would have made the defense applicable if it had not been for the public policy making the defense unavailable in antitrust damage suits. There the plaintiff voluntarily solicited and signed the contract in issue which contained an exclusive dealing clause illegal under the antitrust laws. The plaintiff's damages resulted from this clause. The plaintiff did not attempt to repudiate the contract, as did Penn Water in the present case, but simply brought suit for damages under the antitrust laws, making a motion for interlocutory summary judgment.

In its opinion granting the motion and rejecting the defense of *in pari delicto*, the Court relied on the *Wilder* and *Kiefer-Stewart* cases (and on the Second Circuit decision in *Ring* v. *Spina*, discussed in Point II below). After pointing out that "the antitrust laws were enacted to protect the public and the individual as well," the Court referred to the above-quoted statement by this Court in the *Wilder* case to the effect that the private remedies given

* Northern District of Georgia, Civil Action No. 3892, January 16, 1953 (unreported), abstracted in Appendix B to this petition.

by the antitrust laws were designed to prevent harm to the public and not merely to individuals. The Court continued:

> "Here the provisions of the contracts which are challenged are for the benefit of the corporate defendants. Plaintiff derived no benefit from acting under such provisions since they were restrictive in character and were of sole benefit to the corporate defendants. Under these circumstances, it can not be said that the plaintiff and defendants were in equal fault, and the rule announced in Ring *v.* Spina, 148 F. 2d 647, and in Kiefer-Stewart Co. *v.* Seagram & Sons, 340 U. S. 211, will be followed here."

In three other cases* District Courts in other Circuits have interpreted this Court's decisions in the *Kiefer-Stewart* line of cases in the same manner. Their interpretation is that the principle enunciated by this Court bars the defense of *in pari delicto* in antitrust damage suits.

In the *Trebuhs* case the District Court for the Southern District of New York said:

> "In authorizing private remedies for persons injured by infractions of the antitrust laws, Congress intended to provide not only for private redress but also to impose sanctions to secure the more effective enforcement of antitrust legislation [citing the *Wilder* case discussed above]. The fact that Congress also authorized Government action does not detract from what might be termed the dual character inherent in a civil suit based upon such legislation—vindication of the public interest as well as redress of private injury. * * * Whatever equities may be present as between private litigants, they must yield to the overall public policy of the antitrust laws to prevent monopolies and restraint of trade." (107 F. Supp. at 599).

In that case the District Court also pointed out that public policy is best served by encouraging prosecution by each of the parties to antitrust violations of their respec-

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* *Trebuhs Realty Co.* v. *News Syndicate Co.*, 107 F. Supp. 595 (S. D. N. Y. 1952); *Fanchon & Marco* v. *Paramount Pictures*, 100 F. Supp. 84 (S. D. Cal. 1951); and *Interborough News Co.* v. *Curtis Publishing Co.*, 108 F. Supp. 768 (S. D. N. Y. 1952).

tive claims against each other. The Court rejected the defendant's view that the plaintiff's own violation of the antitrust laws could be a defense in a private antitrust action, saying:

> "Defendants' view, fully spelled out, would mean that when respective litigants are both engaged in antitrust violations, the wrongful conduct of each is a defense to the other's suit, with consequent dismissal of the complaint and a standoff. In effect, the misconduct of each serves to immunize the other from liability. The public interest is caught in the cross-fire of wrongful conduct by the litigants * * *." (107 F. Supp. at pp. 600-601).

In the *Fanchon & Marco* case the District Court for the Southern District of California said:

> "The doctrine which prevents one participating in an alleged illegal scheme from questioning its legality does not apply to this type of action." (100 F. Supp. at p. 33).

In that case the District Court pointed out the philosophy underlying the inapplicability of the defense, also citing the *Wilder* case, and saying:

> "The treble-damage action was intended not merely to redress injury to an individual through the prohibited practices, but to aid in achieving the broad social object of the statute." (100 F. Supp. at p. 88).

To the same effect see *Balian Ice Cream Co.* v. *Arden Farms Co.*, 94 F. Supp. 796, 800-1 (S. D. Cal. 1950).

That the public interest is affected by the claim for treble damages is clear. Thus it has been said that "the private antitrust suit is a curious combination of public regulatory and private compensatory law" and that "the threat of private antitrust attack is a potent deterrent to potential violators." 61 Yale Law Journal 1010, 1011 and 1061 (1952). To the same effect is *Testimony of Walton Hamilton, Hearings Before the Subcommittee on Study of Monopoly Power of the House Judiciary Committee,* 81st Cong., 1st Sess., p. 293 (July 22, 1949):

> "One other word, if I may, along this line: The private antitrust suit is not a private suit; it is a public action."*

Only private suits by participating parties can provide an adequate deterrent to violations of the antitrust laws and thus effectuate the purpose of the Congress to use the remedy of private damage suits to enforce the antitrust laws. This was pointed out by Representative Webb, one of the sponsors of the Clayton Act, when in explaining to Congress the private damage provision, Section 4 of that Act, he stated that the provision "will have a more deterrent effect on the men who practice those things than a mere criminal penalty." 51 Cong. Rec. 16274 (Oct. 7, 1914).

The Government alone cannot effectively enforce the antitrust laws with the remedies granted to it in such laws, because the number of suits it can bring cannot keep pace with the number of antitrust violations. *Antitrust Law Enforcement by the Federal Trade Commission and the Antitrust Division, Department of Justice,* H. R. Rep. No. 3236, 81st Cong., 2nd Sess., pp. 50-51, 75-76 (1951).

Even when instituted, suits by the Government cannot provide the same deterrent that a treble damage recovery can; the effects of private enforcement significantly extend far beyond the immediate parties. Private corporations cannot overlook the impact of possible liability in a private antitrust action. 61 Yale Law Journal 1010, 1062 (1952); Business Week, Apr. 22, 1950, pp. 59-60.

Moreover, private suits by non-participating persons cannot furnish sufficient deterrent to assure compliance with the antitrust laws. In many instances non-participating parties are not injured or are injured inconsequentially and, even when they are injured, they often do not have sufficient knowledge of the facts to permit them to bring effective actions.

The same public policy toward permitting recovery, without qualification, by any person injured has been given

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* To the same effect, see also *White Bear Theatre Corp.* v. *State Theatre Corp.*, 129 F. 2d 600, 604 (8th Cir. 1942); *Johnson* v. *Joseph Schlitz Brewing Co.*, 33 F. Supp. 176, 179, 182 (E. D. Tenn. 1940), *aff'd*, 123 F. 2d 1016 (6th Cir. 1941).

effect by the courts under other statutes where, as here, the paramount purpose was to provide a deterrent to violators of the statutes.*

A particularly clear illustration of how allowing or not allowing recovery relates to the policy of enforcing the antitrust laws is presented by Penn Water's claim with respect to its contract litigation expense, as to which the Court below also denied recovery on the grounds of *in pari delicto*. Failure to grant reimbursement of such expense certainly does not encourage parties to illegal contracts to bring suits to have them declared illegal and vindicate the public policy of the statute. The Courts have therefore allowed recovery of such expense in furtherance of the statutory policy. Thus in a recent decision, *Kobe, Inc.* v. *Dempsey Pump Co.*, 198 F. 2d 416 (10th Cir. 1952), *cert. den.* 344 U. S. 837 (1952), the Court of Appeals for the Tenth Circuit affirmed the allowance of legal expense in an antecedent antitrust proceeding as an element of antitrust damages and the allowance of the expenses of the treble

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* (a) Bituminous Coal Act of 1937—*Costanzo Coal Min. Co.* v. *Weirton Steel Co.*, 150 F. 2d 929 (4th Cir. 1945), *cert. den.* 326 U. S. 765 (1945); (b) Veterans Administration Housing Act in 1946—*United States* v. *Murtaugh*, 190 F. 2d 407 (4th Cir. 1951); (c) Price Control Act—*Kenney* v. *Hood*, 158 F. 2d 226 (5th Cir. 1946); *Porter* v. *Crawford & Doherty Foundry Co.*, 154 F. 2d 431 (9th Cir. 1946), *cert. den.*, 329 U. S. 720 (1946); (d) purchase of stock by a corporation in violation of statute—*Duddy-Robinson Co.* v. *Taylor*, 137 Wash. 304, 242 Pac. 21 (1926); *Darnell-Love Lumber Co.* v. *Wiggs*, 144 Tenn. 113, 230 S. W. 391 (1921); and (e) purchase and sale of stock in violation of Blue Sky laws—*Gilchrist* v. *Hatch*, 183 Ind. 371, 106 N. E. 694 (1914); *Felton* v. *Highlands Hotel Co.*, 165 Ga. 598, 141 S. E. 793 (1928); *cf. In re Builders' Finance Ass'n.*, 26 F. 2d 123 (S. D. Calif. 1928). As *Corpus Juris Secundum* in citing certain of foregoing cases says:

> "Although the parties are *in pari delicto*, yet the court may interfere and grant relief at the suit of one of them, where public policy requires its intervention, even though the result may be that a benefit will be derived by a plaintiff who is in equal guilt with defendant; but here the guilt of the parties is not considered as equal to the higher right of the public, *and the guilty party to whom the relief is granted is simply the instrument by which the public is served.*" (17 C. J. S. 665-6). (Emphasis supplied).

damage proceeding as single damages under the statute, as requested here.

The decision below barring Penn Water's recovery on the grounds of *in pari delicto* is in conflict with the provisions of the Sherman and Clayton Acts and the public policy enunciated thereby as well as the whole course of decisions of this Court and other courts under the antitrust laws and should be reviewed by this Court.

II.

The decision below is in conflict with earlier decisions in other Circuits which, while recognizing the defense to a limited extent, allowed recovery by a plaintiff who repudiated and resisted the illegal acts of the defendant.

A few of the early decisions of Courts of Appeals in other Circuits recognize to some extent the defense of *in pari delicto* in antitrust suits. Nevertheless, those decisions limited the application of the doctrine to cases where the plaintiff acquiesced or participated in the illegal acts of the defendant, and permitted recovery when the plaintiff resisted or repudiated the acts.* The plaintiff here resisted and repudiated the illegal acts of the defendant. Consequently, the holding below is also in conflict

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* *Ring* v. *Spina*, 148 F. 2d 647 (2d Cir. 1945); *Connecticut Importing Co.* v. *Frankfort Distilleries*, 101 F. 2d 79 (2d Cir. 1939); *Connecticut Importing Co.* v. *Continental Distilling Corporation*, 129 F. 2d 651 (2d Cir. 1942), *cert. den.*, 317 U. S. 664 (1942); *Eastman Kodak Co.* v. *Southern Photo Co.*, 295 Fed. 98 (5th Cir. 1923), *aff'd*, 273 U. S. 359 (1927); *Victor Talking Mach. Co.* v. *Kemeny*, 271 Fed. 810 (3d Cir. 1921). Contrast the older cases relied on by the Courts below where the plaintiff acquiesced or participated in the illegal acts of the defendant: *Bluefields S.S. Co.* v. *United Fruit Co.*, 243 Fed. 1 (3d Cir. 1917) and *Eastman Kodak Co.* v. *Blackmore*, 277 Fed. 694 (2d Cir. 1921).

with these decisions in other Circuits, as well as with the group of decisions in other Circuits which hold the defense entirely inapplicable in antitrust damage cases.

The focal facts, all of which stand adjudicated, are: Penn Water entered into the contract containing the illegal restrictions while under third party control and, after the control was removed in 1946, Penn Water resisted the restrictions, whereas Consolidated insisted on their enforcement and threatened damages for noncompliance. Subsequently, September 28, 1948, Penn Water by suit attempted repudiation. On November 23, 1948, Consolidated formally prohibited Penn Water from building a new steam generating plant and instead went ahead with its own competing steam generating plant. Thereafter, during the period in which the damages occurred, Penn Water, the victim of the illegal controls and acts, continued to resist them whereas Consolidated, the beneficiary of the illegal controls and acts, continued to insist upon them.

Under the Courts of Appeals decisions in other Circuits just referred to, Penn Water could not be deemed equally guilty, or *in pari delicto,* with Consolidated. Under such circumstances, even these older cases permitted the plaintiff to recover.

In the *Ring* case the plaintiff signed the contract which injured him and then renounced the contract. The defendant insisted on compliance with the contract. The Court (Second Circuit) held the plaintiff could recover. The Court pointed out it is well settled that where one party to an illegal contract is coerced by the other party by means of the contract, the parties are not *in pari delicto,* and that the plaintiff was precisely the type of individual whom the Sherman Act sought to protect. The Court said (148 F. 2d at p. 653):

> "Considerations of public policy demand court intervention in behalf of such a person, even if technically he could be considered in pari delicto. Indeed, this is a general principle applicable beyond the anti-trust field, [citing cases]. Any other conclusion would mean that for many, perhaps most, victims of

> restraint of trade, private remedies under the Sherman Act would be illusory, if not quite non-existent."

Furthermore, the Court said (at p. 652):

> "there appears a definite tendency to hold those not actively engaged in promoting monopoly to be victims, rather than participants in anti-trust violations."

In the two *Connecticut Importing Company* cases the plaintiff and the defendant were parties to an illegal price fixing agreement. In both cases the Court (Second Circuit) permitted the plaintiff who had renounced the illegal agreement to recover, rejecting the defense of *in pari delicto,* saying in the first case (101 F. 2d at p. 81):

> "This is not a suit in equity where the clean hands doctrine is applicable but merely a suit on a special statute which takes no account of the conduct of the plaintiff prior to the time the cause of action arose."*

The plaintiff was allowed by the Court of Appeals for the Third Circuit to recover under substantially similar circumstances in the *Victor Talking Machine* case.**

Thus the decision below is in conflict with this line of decisions in other Circuits and this conflict is a further basis for the granting of certiorari.

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* The same Court of Appeals in the *Ring* case *supra,* quoted the above passage, and then went on to say (148 F. 2d at pp. 652-3):

> "This idea was carried further [citing case] to hold that an alleged illegal agreement between plaintiff and defendant 'cannot be used to defeat plaintiff's right of action based upon the overriding statutory policy of the Sherman Act, if that right of recovery is otherwise clear.' "

** The same result was reached by the District Court in Pennsylvania. *Hartford-Empire Co.* v. *Glenshaw Glass Co.,* 47 F. Supp. 711 (W. D. Pa. 1942). State courts have reached the same results under state antitrust laws. *Shute* v. *Shute,* 180 N. C. 386, 104 S. E. 764 (1920); *Brennan* v. *United Hatters of North America,* 73 N. J. L. 729, 65 Atl. 165 (1906); and *Ertz* v. *Produce Exchange Co.,* 82 Minn. 173, 84 N. W. 743 (1901).

III.

If this Court has not passed on this important question, as implied by the Court of Appeals below, it should do so.

The Court of Appeals below held that the three recent decisions of this Court (*Mandeville, Kiefer-Stewart* and *Moore*) permitting recovery by the plaintiff did not govern this case, with the clear implication that it thought this Court had not passed on the question presented by this case.

The Court below discussed the facts in these three recent decisions and made a distinction between the facts there involved and the facts in the present case. Unlike the Tenth Circuit in the *Moore* case, the Court below did not discuss, or apply, the principle enunciated in those cases that the defense of *in pari delicto* is not available in antitrust suits because of the public policy of the antitrust laws to encourage such suits as a deterrent to future violations. Nor did it discuss the unqualified language of the antitrust statutes.

The distinction attempted by the Court below was that the respective plaintiffs in the three recent decisions of this Court had not been parties to the same illegal acts or transactions as the respective defendants, whereas, in the present case, the plaintiff and defendant were parties to the same illegal acts or transactions.

There are several refutations of this attempted distinction: (a) two of the cases (*Moore* and *Mandeville*) are not susceptible of this fact distinction; (b) there is no sound basis for such a distinction as a matter of principle; and (c) the plaintiff here did not participate in the illegal acts of the defendant, *i.e.*, the exercise of the illegal controls, but resisted and repudiated them.

(a) The plaintiff in the *Mandeville* case was allowed by this Court to recover, notwithstanding that he had signed the agreement containing the illegal pricing arrange-

ment which caused his damages. The Court of Appeals for the Tenth Circuit in the *Moore* case did not treat the plaintiff as having participated in an illegal act separate from that of the defendant but, instead, stated he had participated in the same "illegal undertaking," a price war.

(b) Irrespective of the factual distinctions, if any, between these three recent decisions of this Court and this case, it is Penn Water's position that the decision of the Court below has defeated the public policy restated by this Court in the three recent decisions by denying recovery in this case.

There is no sound distinction (such as was attempted by the Court of Appeals below) between participation, in the course of a price war, in separate but instigating acts which are illegal under the antitrust laws, and participation in the same illegal act under the antitrust laws. There is no logical basis for a distinction between participation in a separate act which directly causes retaliatory illegal acts and participation in the very same violation. It would be unsound to defeat the public policy expressed in the antitrust laws by such a distinction, since the private antitrust suit was mainly intended to protect the public interest in the competitive system rather than an injured individual. The person who starts an illegal price war, as in the *Moore* case, would seem to be more guilty than one who takes action to resist and repudiate the illegal acts which caused his damage. Yet the one who started the price war was allowed to recover in the *Moore* case, whereas Penn Water, the one who resisted and repudiated the illegal acts, has been barred from recovery in this case.

(c) Finally, the plaintiff in this case (Penn Water) did not participate in the illegal acts of the defendant (Consolidated) which caused Penn Water's damage. This is not a case where the plaintiff acquiesced in the illegalities and then subsequently sued to recover for his damages.

Instead, Penn Water resisted and repudiated the illegal acts, both before and after they took place.

Whether or not the Court of Appeals below is correct in its attempt to distinguish the facts in the three recent decisions of this Court from those of the present case, the clear implication of the decision below, that this Court has never passed on the availability in an antitrust damage suit of the defense of *in pari delicto,* calls for the granting of certiorari. The Court of Appeals' holding in this case is not only that the defense of *in pari delicto* is available in antitrust damage suits, but that the defense may even be invoked against a plaintiff who resisted and repudiated the illegal acts of the defendant which injured him. No decision of this Court has ever so held.

Moreover, the issue spreads far beyond this immediate case. Are the antitrust laws to be circumscribed and partially nullified by the limitation in their scope enunciated by the Fourth Circuit? There is no basis in the Sherman or Clayton Acts for the defense of *in pari delicto* or the narrow concept of the liability of violators of these laws, such as that invoked by the Court below. Is a violator of the antitrust laws, once it has entered into an illegal agreement with another, to be thereafter granted immunity to perpetrate upon the other further violations of the antitrust laws, even despite the latter's resistance and repudiation? Such a result, instead of furnishing a deterrent to violations of the antitrust laws, would provide a protection for non-compliers and afford them an opportunity to violate the antitrust laws without risk of paying damages for their violation. The greater the number of participants that a violator could recruit in an illegal scheme, the greater would be his immunization from antitrust law liability. This Court should not countenance such a limited application of the antitrust laws and thereby enable violators to escape liability for their acts.

Conclusion.

The question raised by this petition is of general application relating to the scope of the antitrust laws and is of paramount importance under such laws. It should be passed upon and settled by this Court if it has not already been settled, as Penn Water contends, by the three recent decisions of this Court.

The petition should be granted.

March 12, 1954.

Respectfully submitted,

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APPENDIX A.

Bills Rejected by Congress (Which Would Have Made Plaintiff's Violation of the Antitrust Laws a Defense) and Contrasting State Statute.

During the 50th and 51st Congress in 1888 and 1889 many antitrust law bills were introduced in addition to the bill which was finally enacted as the Sherman Act. These proposed bills all provided that plaintiff's violation of the antitrust laws could be pleaded by defendant as either a complete or partial defense.* For example, S. 6 (George Bill), 51st Cong., 1st Sess., introduced December 4, 1889 and referred to Committee on Finance on the same day (see 21 Cong. Rec. 96 (1889)) the Committee received the original Sherman Bill, provided:

> "SEC. 2. That when any action or suit in law or equity shall be commenced, or shall be pending in any court of the United States, it shall be lawful for any defendant therein to except to the jurisdiction of such court upon the ground that the cause of action or suit is for the enforcement of a right of a person or corporation violating any of the provisions of the first section of this act based on a contract for the sale, exchange, or transportation, or based on any damage arising from any wrong committed in respect to any article of merchandise manufactured, transported, imported, bought, or sold in violation of the provisions of said first section; and if such ground of exception shall be proven to the satisfaction of the court, judgment of dismissal shall be entered, with double costs to the defendant, and with such reasonable sum for the attorney's fees for the defense thereof as may be allowed by the court."

The following proposed bills had practically identical provisions to those set forth above:

H. R. 509, Sec. 2, 51st Cong., 1st Sess. (1889).
H. R. 826, Sec. 2, 51st Cong., 1st Sess. (1889).
H. R. 846, Sec. 4, 51st Cong., 1st Sess. (1889).

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* Copies of these bills and debates in Congress relating to trusts are compiled in Sen. Doc. No. 147, 57th Cong., 2nd Sess. (1903).

As another example, four bills in the 50th Congress, 1st Session (1888) (S. 3476, Sec. 4 and S. 3510, Sec. 8 and H. R. 11279, Sec. 4 and H. R. 11343, Sec. 5) provided:

> "That when any action at law or suit in equity shall be commenced in any court of the United States it shall be lawful in the defense thereof to plead in abatement that the plaintiff or complainant or any other person interested in the prosecution of the case is a member or agent of a trust as described in the first section of this act, or that the cause of action grows out of such a trust or out of some business or transaction of such a trust."

The following additional proposed bills also had provisions similar to the above quoted bills:

H. R. 811, Secs. 1, 2, 51st Cong., 1st Sess. (1889).
H. R. 202, Secs. 5, 7, 51st Cong., 1st Sess. (1889).
H. R. 3844, Secs. 5, 7, 51st Cong., 1st Sess. (1890).
H. R. 6117, Sec. 6, 50th Cong., 1st Sess. (1888).

Kansas Antitrust Act of 1889.

The Kansas Antitrust Act enacted shortly before the introduction of the original Sherman bill provided that the plaintiff's violation of the statute could be interposed as a defense as follows:

> "An Act to declare unlawful trusts and combinations in restraint of trade and products, and to provide penalties therefor.
>
> • • • • • •
>
> "SEC. 4. That any person or corporation injured or damaged by any such arrangement, contract, agreement, trust or combination described in sections one or two of this act, may sue for and recover in any court of competent jurisdiction in this state, of any person or corporation, the full consideration or sum paid by him for any goods, wares, merchandise and articles included in or advanced or controlled in price by said combination, or the full amount of money so borrowed.

"SEC. 5. That when an action at law or suit in equity shall be commenced in any court of this state, it shall be lawful in the defense thereof to plead in bar or in abatement that the plaintiff or any other person interested in the prosecution of the case is a member or agent of an unlawful combination as described in sections one or two of this act, or that the cause of action grows out of such combination, or out of some business or transaction thereof." (Laws of Kansas 1889, C. 257).

APPENDIX B.

Abstract of *Red Rock Bottlers, Inc.* v. *Red Rock Cola Company,* Civil Action No. 3892 (U. S. D. C. N. D. Ga., Jan. 16, 1953) (unreported).

This was an action for treble damages under the antitrust laws against Red Rock Cola Company and Red Rock Company, manufacturers of syrup used in the preparation of Red Rock soft drinks, predicated on violations of the antitrust laws arising out of contracts "voluntarily sought and executed on behalf of the plaintiff."

The contracts on which the suit was based granted Bottlers the exclusive rights to bottle and distribute Red Rock Cola and Red Rock beverages respectively throughout an extensive territory. Under the contracts, Bottlers agreed not to bottle, sell, distribute or manufacture soft drinks other than those bearing the trade-mark "Red Rock," and to purchase a specified minimum amount of concentrate or syrup from the licensor during any one year.

Although the plaintiff Bottlers never repudiated the contracts it brought the treble damage action, claiming that the exclusive dealing provisions in the contracts violated §3 of the Clayton Act and that the defendants used the contracts to extract from the plaintiff payments for flavor concentrates which were substantially in excess of prevailing prices in the soft drink industry.

On the plaintiff's motion for interlocutory summary judgment, the defendants urged that *Eastman Kodak Co.* v. *Blackmore,* 277 Fed. 694 (2d Cir. 1921), precluded the granting of the motion. They asserted:

> "the plaintiff could have no recovery herein since it is *in pari delicto,* in as much as the precise contracts sued upon were the result of proposals made by or on behalf of the plaintiff company, and it was a voluntary party to each contract."

Although the Court found that the contracts involved "were voluntarily sought and executed on behalf of the

plaintiff," it nevertheless granted plaintiff's motion. In so doing the Court stated:

> "It must be borne in mind that the anti-trust laws were enacted to protect the public and the individual as well. As was said by Chief Justice White in Wilder Manufacturing Co. *v.* Corn Products Ref. Co., 236 U. S. 165, 174, 59 L. Ed. 520:
>
> > 'In other words, founded upon broad conceptions of public policy, the prohibitions of the statute were enacted to prevent not the mere injury to an individual which would arise from the doing of the prohibited acts, but the harm to the general public which would be occasioned by the evils which it was contemplated would be prevented, and hence not only the prohibitions of the statute, but the remedies which it provided, were coextensive with such conceptions.'
>
> "Here the provisions of the contracts which are challenged are for the benefit of the corporate defendants. Plaintiff derived no benefit from acting under such provisions since they were restrictive in character and were of sole benefit to the corporate defendants. Under these circumstances, it can not be said that the plaintiff and defendants were in equal fault, and the rule announced in Ring *v.* Spina, 148 F. 2d 647, and in Kiefer-Stewart Co. *v.* Seagram & Sons, 340 U. S. 211, will be followed here."

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No. 632

10

United States Court of Appeals

FOR THE FOURTH CIRCUIT.

No. 6667.

PENNSYLVANIA WATER & POWER COMPANY,
Appellant,

vs.

CONSOLIDATED GAS ELECTRIC LIGHT AND POWER COMPANY OF BALTIMORE,
Appellee.

APPENDIX FOR APPELLANT, PENNSYLVANIA WATER & POWER COMPANY.

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APPENDIX.

IN THE

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MARYLAND.

PENNSYLVANIA WATER & POWER COMPANY, Plaintiff, *v.* CONSOLIDATED GAS ELECTRIC LIGHT AND POWER COMPANY OF BALTIMORE, Defendant.	Civil Action No. 5884. (Second Cause of Action.)

Second Memorandum by the Court.

THE ANTITRUST CLAIM

In No. 5884, as a second cause of action, Consolidated [Penn Water]* counts on the Sherman and Clayton Acts[1] for the recovery of treblefold damages of some $18,000,000.00. Summed, the damages untrebled represent (1) the loss caused Penn Water by Consolidated's prohibition of its plant expansion, through enforcement of those restrictions of the two-party contract heretofore held[2] violative of the Federal antitrust statutes; and (2) the litigation expenses incurred by Penn Water in the trials and appellate proceedings prosecuted to obtain the nullification of the restrictions of the two-party, and afterwards the

[1] 15 USCA 1 *et seq.*

[2] 184 F. 2d 552.

* This reference in the opinion to "Consolidated" is evidently a typographical error. The reference necessarily intended was to "Penn Water".

three-party,[3] agreement. Damages on the second score are asked only if the litigation expense, in its single amount, is not recovered as an unpaid bill, in 4610, 5884 and 6182. Summary judgment of liability on both of these claims, with subsequent trial to determine the quantum of the damages, is pressed for by the plaintiff.

In the claim based on prevention of the plant expansion, the motion maintains that the Court of Appeals for this Circuit in the two-party contract case[4] has found, conclusive here, that Consolidated in effectuation of the unlawful restriction of that agreement prohibited Penn Water from erecting new facilities at its plant. Article V of the contract made any substantial expansion of the plant dependent upon the prior approval of Consolidated.

Countering, the attorneys for Consolidated meticulously trace each step in the trial and on the appeal. They demonstrate that the validity of the contract was tested solely on its face, undeviatingly, without reference to enforcement and regarding no circumstance dehors its words and figures. Consequently, says Consolidated, there was no place or basis for a finding as to what had been done under the contract.

The truth is, though, that both the District court and the Circuit court found the prohibition an actuality. Witness the District Judge, in an opinion adopted as a statement of his findings, 89 F. Supp. 452, 460: "Continued disagreements between the two companies came to a head in 1948 when Electric (Consolidated) refused to approve Power's (Penn Water's) proposed new plant expansion at Holtwood, Pennsylvania." More specific is the opinion of the Circuit court: "Consolidated has actually exercised its restrictive powers in approving or disapproving Penn Water's contracts and by prohibiting Penn Water's proposals for plant expansion, notably, a proposal by Penn Water in 1948 for plant expansion at Holtwood whereby coal from the river could be salvaged and power economically

[3] 194 F. 2d 89.

[4] 184 F. 2d 552.

produced. At the same time Consolidated erected a new steam plant for itself at Riverside, Maryland.

"It follows that the contract is invalid because it violates Section 1 of the Sherman Act, 15 U. S. C. A. sec. 1, which provides that every contract in restraint of trade or commerce among the several states is illegal." 184 F. 2d 552, 558.

Neither of these findings was ever questioned. It was a background and historical fact, necessary for an understanding of the case, and provocative of the litigation. It exposed the vitality and virility of the contract provision. Both parties clearly acknowledged its truth through complete acquiescence in its use. Certainly they permitted the courts to accept it unqualifiedly. It is too late to deny its verity. But definite basis for the court's findings is disclosed by the pleadings in the case. Paragraph 19 of Penn Water's amended complaint avers, "Defendant on November 23, 1948 advised plaintiff that it * * * would not approve the expansion of facilities contemplated by plaintiff." Additional steam electric generating facilities at Holtwood, to cost $10,000,000, was the expansion proposed. Consolidated's answer (par. 13) admits all of paragraph 19 of the amended complaint "except as answered and denied herein"; it makes no categorical denial of a refusal to approve the expansion, but explains why approval was not given. Surely this is an admission of the asseveration.

Failure or refusal to approve the expansion was prohibition and prevention of the expansion. Penn Water would not, of course, enlarge its facilities without such approval. It could not sell the additional energy without the consent of Consolidated, and no return on the added investment would be obtainable without such approval.

In the present case, the issue of prohibition or prevention by Consolidated of the erection by Penn Water of the new facilities is concluded against Consolidated by the findings of the District Court and the Court of Appeals in the earlier litigation. Even more plainly do these prior decisions of the Court of Appeals foreclose against Consolidated, for the purpose of the plaintiff's claim for the

litigation expenses, the question whether the two-party and three-party contracts were "anything forbidden in the antitrust laws."[5]

In Pari Delicto

Nevertheless, the Court is of the opinion that Penn Water cannot be granted damages under the Federal antitrust laws, for Penn Water was itself a principal, and peer of Consolidated, in the violations on which it now asks judgment against Consolidated. The unrefuted and irrefutable facts of record in the present action point uncompromisingly to this conclusion. The prior decisions[6] of the Court of Appeals did not pass upon the point.

The violations consisted of signing, sealing and delivering the contracts, two-party and three-party. In this Penn Water was no less particeps than Consolidated. By the agreements Penn Water promised to suffer Consolidated to do just what now forms Penn Water's grievance. Though the contracts did render Penn Water completely submissive to Consolidated, the submission was deliberate, willing and at Penn Water's price—a figure somewhat dear, the Federal Power Commission has reported. Furthermore, submission was as major a role in the performance of the contracts, quite as important a part to accomplish the common design of the parties, as was domination. Thus, on the facts Penn Water indisputably was *in pari delicto* with Consolidated.

On the law, the degree of Penn Water's violation was no less than that of Consolidated, and the equality of their guilt is just as plain as it is on the facts. The clause of the Sherman Act on which this action is predicated, and against which the contracts were broken, provides that "Every contract * * * in restraint of trade or commerce * * * is declared to be illegal." As it is obvious that there could have been no contracts without the free consent and full participation of both Consolidated and Penn Water, so it

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[5] 15 USCA 15.

[6] 184 F. 2d 552; 194 F. 2d 89.

is obvious that without Penn Water's equal participation Consolidated could not have violated the act. Indeed, Penn Water cannot state its cause of action without pleading its own violation of the statute, or without pleading that the violations by Consolidated were joint ventures with Penn Water.

Legal recourse in these circumstances is not withheld in order to protect the defendant. Nor is the denial based on the doctrine of estoppel. The refusal is to enforce the statute. It is an efficacious means of sustaining the policy of the Congress denouncing illegal restraints in commerce. Illegal trade practices would be encouraged by permitting recovery of their losses.

The action is not for breach of the contracts but for breach of the statute. Private recovery is sought on the basis of a law enacted solely for the public interest. The furtherance of this interest should, therefore, be the foremost concern of the Court, albeit the litigation is private. It was to this end that the Court of Appeals took action in the previous suits. Damages were not an issue. The Court only declared that the contracts transgressed the law of the land. It was a declaration in the public interest, and for that reason the Court was not concerned whether the parties were *in pari delicto.*

Applying these principles here, the public interest is more solicitously stewarded by leaving the private parties where they find themselves. That interest is not affected by the claims for damages. Recovery by Penn Water would not inure to the benefit of its customers; on the other hand, it would ultimately penalize the consumers of Consolidated. If the parties are left to suffer their own damages, the public is unharmed, the law is enforced, the parties are punished, but redress is still open to any third person injured by their violations. The Court believes too, that non-action would be a greater deterrent to future infractions than the entertainment of claims and counterclaims for damages.[7]

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[7] See for thoughtful discussions: #46 Illinois Law Review 654, 660 (1951) and 61 Yale Law Journal 1010, 1029 (1952).

This has been the counsel of the Federal Courts consistently.[8] The Supreme Court has never disapproved that attitude when an unduressed plaintiff and defendant are equally, immediately and intimately involved in the identical violation. We do not think it intended to do otherwise in *Kiefer-Stewart Co.* v. *Joseph E. Seagram & Sons*, 340 U. S. 211. There the violation of the statute was not the joint accomplishment of the claimant and the defendant. They were not principals in the same violation. Their mutual promises had not created the violation. There was just no case made for the rule of *in pari delicto*. The Court did not mention the doctrine. It intimated no abrogation or modification of it.

The remand of *Moore* v. *Mead Service Co.*, 10 Cir., after the first decision, 184 F. 2d 338, and the denial of certiorari to the second, 190 F. 2d 540, implied no discard of *in pari delicto* in antitrust cases, where the same violation was equally chargeable to the complainant and respondent. In *Moore-Mead* the rejection of the first breach of the statute as a bar to the subsequent action was obviously not the rejection of the principle of *in pari delicto*, for the breaches were not the result of a joint enterprise between the parties litigant. Similarly, the existence of reciprocal covenants between the plaintiff and the defendant creative of the violation distinguishes the case at bar from *Trebuhs Realty Co.* v. *News Syndicate*, S. D. N. Y. 107 F. Supp. 595; *Interborough News* v. *Curtis Publishing Co.*, S. D. N. Y. 108 F. Supp. 768; and *Fanchon & Marco* v. *Paramount*, S. D. Cal. 100 F. Supp. 84.

No precedent is to be found in the price control cases exemplified by *U. S.* v. *Murtaugh*, 4 Cir. 190 F. 2d 407. The claimants in those cases were compelled to submit to the illegality by the very emergency which was the reason for the statute. They were *in delicto* but by no means *in pari delicto*.

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[8] *Eastman Co.* v. *Southern Photo Co.*, 273 U. S. 359, 377; *Bluefields S. S. Co.* v. *United Fruit Co.*, 3 Cir. 243 F. 1; *Eastman Kodak Co.* v. *Blackmore*, 2 Cir. 277 F. 694; *Northwestern Oil Co.* v. *Socony-Vacuum Oil Co.*, 7 Cir. 138 F. 2d 967, cert. den. 321 U. S. 792; *Ring* v. *Spina*, 2 Cir. 148 F. 2d 647; *Singer* v. *A. Hollander & Son*, 3 Cir. F. 2d Jan. 27, 1953.

The plant expansion damages in the present litigation have their source in unlawful acts committed within the period of *pari delicto*. The record tells no story of a *locus poenitentiae* in which the plaintiff reformed but thereafter fell a victim to renewed designs of Consolidated. The antitrust injury to the plaintiff—prevention of the plant expansion—was inflicted at a time, not later than November 1948, when the contracts were valid, subsisting and binding in the minds of both parties. True, the damaging effects of the injury, such as loss by reason of the delay, continued until January, 1951, the date of the avoidance of the two-party contract, but the continuation is attributable to bona fide litigation of the validity of the agreement, a real and substantial controversy. All of such damage flows directly, without supervening cause, from the original injury, the unlawful restraint imposed before repudiation of the agreement for its antitrust character.

The litigation expenses are also unseverably the incidents and resulting damage of the initial common violation of law, although the expenditures were made after the attacks had been commenced against the contracts. This is true of the expenses of the three-party agreement suit as well. But the comprehensive reason for the inability of the plaintiff to succeed in its claim for the litigation costs of either action, as damages, is the precept of *in pari delicto*. Likewise would the claim have been precluded if it had been incorporated originally in each action.

The plaintiff's motion for summary judgment on the antitrust claims will be denied. On this part of No. 5884 judgment will be entered for the defendant under 54(c) of the Federal Rules of Civil Procedure, or under Rule 56, if the defendant desires now to file a motion for summary judgment.

In a subsequent memorandum the Court will pass upon the remaining counterclaim in 5884 and the claim in 6181.

(Sgd.) ALBERT V. BRYAN

United States District Judge.

[Filed April 6, 1953.]

Judgment and Order, filed April 30, 1953.

This action came before the Court on February 26, 1953, on motion of plaintiff for summary judgment that defendant is liable to plaintiff upon the second cause of action in treble damages under the Federal Antitrust laws for injury to the business and property of plaintiff, as set forth in the motion itself, dated July 31, 1952.

Upon consideration of the motion, the complaint, the answer, the record in Case No. 6102 between the parties before the Court of Appeals for the Fourth Circuit, the affidavits, and the briefs and oral arguments of counsel, it is, for the reasons set forth in the Second Memorandum by the Court, dated April 6, 1953 and filed in this and its companion actions, this 30th day of April, 1953,

1. ORDERED AND ADJUDGED that the motion of plaintiff for summary judgment as to the second cause of action be and it hereby is denied.

It further appearing to the Court that defendant is entitled to summary judgment dismissing the complaint as to the second cause of action because the pleadings, affidavits, memoranda and other papers on file herein show that there is no genuine issue as to any material fact bearing upon defendant's right to summary judgment and that defendant is entitled to said summary judgment as a matter of law, and the Court further determining that there is no just reason for delay in entering final judgment dismissing the second cause of action of the complaint, it is—

2. ORDERED, ADJUDGED AND DIRECTED that final judgment be entered herein dismissing the second cause of action of the complaint.

ALBERT V. BRYAN
United States District Judge Specially
Designated to Sit in a District Court
for the District of Maryland.

Alexandria, Virginia

Complaint in Civil Action No. 5884—Excerpts.

Plaintiff, complaining of defendant, respectfully alleges and shows to this Court as follows:

As to Each of the Causes of Action

1. Plaintiff, Pennsylvania Water & Power Company (Penn Water), is a corporation organized and existing under the laws of the Commonwealth of Pennsylvania, having a principal place of business at Holtwood in said Commonwealth, and is domiciled in the Commonwealth of Pennsylvania. Penn Water is an electric utility company which owns and operates a hydroelectric and steam electric generating plant located on the Susquehanna River at Holtwood, Lancaster County, Pennsylvania, together with a transmission system.

2. Defendant, Consolidated Gas Electric Light and Power Company of Baltimore (Consolidated), is a corporation organized and existing under the laws of the State of Maryland, having a principal place of business in the City of Baltimore, in said State, and is domiciled in the said State of Maryland. Consolidated is a public utility engaged in the generation, purchase and sale of electric services in the City of Baltimore, Maryland, and elsewhere.

3. The matter in controversy exceeds, exclusive of interest and costs, the sum of Three Thousand Dollars ($3,000).

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Second Cause of Action

14. This cause of action arises under Sections 1, 3 and 7 of the Act of Congress of July 2, 1890, c. 647, 26 Stat. 209, entitled "An Act to Protect Trade and Commerce Against Unlawful Restraints and Monopolies", as amended, commonly known as the Sherman Act (15 U. S. C. §§1, 3 and 7), and under Section 4 of the Act of Congress of October 15, 1914, c. 323, 38 Stat. 730, as amended, commonly known as

the Clayton Act (15 U. S. C. §15), all of said laws being termed herein the antitrust laws.

15. This cause of action is brought to recover from Consolidated the damages to which Penn Water is entitled under Section 7 of the Sherman Act (15 U. S. C. §7) and Section 4 of the Clayton Act (15 U. S. C. §15) for injury to the business and property of Penn Water by reason of acts of Consolidated forbidden in the antitrust laws.

16. The Court of Appeals for the Fourth Circuit rendered two decisions in an action relating to a purported power contract between Penn Water and Consolidated, consisting of three agreements dated December 31, 1927, June 1, 1931 and September 29, 1939 (the Two-Party Agreement attached hereto and made a part hereof as Exhibits A-1, A-2 and A-3), on September 30, 1950 (184 F. 2d 552 (4th Cir. 1950), cert. den. 340 U. S. 906 (1950)), and January 10, 1951 (186 F. 2d 934 (4th Cir. 1951)). Pursuant to the aforesaid decisions this Court entered its judgment of January 17, 1951 in favor of Penn Water and against Consolidated. Copies of said decisions of the Court of Appeals are attached hereto as Exhibits B and C, respectively, and all statements therein are incorporated as allegations herein.

17. Said judgment of this Court, the aforesaid decisions of the Court of Appeals and the statements contained therein are *res adjudicata* as between the parties.

18. By these decisions and judgment, the Two-Party Agreement was adjudicated to be illegal and invalid, null and void *ab initio* in its entirety, as in violation of the antitrust laws and common law and in contravention of the laws of Pennsylvania and against public policy.

19. The Court of Appeals said in its decision of September 30, 1950 as follows (Ex. B, pp. 10-11):

> "The District Judge found and it is not disputed that the effect of the quoted provisions of Articles

IV and V of the contract is to confer upon Consolidated the power to control (1) the prices at which Power [Penn Water] may sell its product; (2) the extent to which Power may extend its plant; (3) the territory in which Power may sell its product; and (4) the amount of back feed energy which Power must purchase from Consolidated.

"We are in agreement with this interpretation of the contract. It expressly forbids plant expansion or development by Penn Water without Consolidated's consent; and also forbids the sale of electric energy by Penn Water without Consolidated's approval, and accordingly empowers Consolidated to fix Penn Water's prices. Hence the effect of the contract was to divide between two large power companies a trade territory wherein they would otherwise have been competitors; and to give one of them the power to fix prices for the other and to forbid plant expansion by the other, however beneficial to the other or to the public interest it might be.

"Consolidated has actually exercised its restrictive powers in approving or disapproving Penn Water's contracts and by prohibiting Penn Water's proposals for plant expansion, notably, a proposal by Penn Water in 1948 for plant expansion at Holtwood whereby coal from the river could be salvaged and power economically produced. At the same time Consolidated erected a new steam plant for itself at Riverside, Maryland.

"It follows that the contract is invalid because it violates Section I of the Sherman Act, 15 U. S. C. A. §1, which provides that every contract in restraint of trade or commerce among the several states is illegal."

20. Consolidated prohibited Penn Water from constructing its new steam plant, although Consolidated said in its letter of November 23, 1948 to Penn Water (attached hereto as Exhibit D) that both companies were in agree-

ment that additional facilities would be required to serve the customers of Penn Water and Consolidated in 1951, when Penn Water's new steam plant was scheduled for completion.

21. If Penn Water had been permitted to proceed in November 1948 with the construction of its steam plant, coal recovery plant and associated facilities as planned, the proposed new facilities would have been in commercial operation since November 1951.

22. As a result of the illegal acts of Consolidated pursuant to the Two-Party Agreement in prohibiting construction of the new steam plant, coal recovery plant and associated facilities by Penn Water, such construction was delayed for approximately two and one-half years.

23. After this Court entered its judgment on January 17, 1951 declaring the Two-Party Agreement to be void and of no effect, Penn Water proceeded promptly with plans for construction of the proposed new steam generating and coal recovery plants with associated facilities.

24. Penn Water has proceeded with the construction of the steam plant, coal recovery plant and associated facilities with due diligence, and under the present circumstances relating to availability of labor and materials, the steam plant is scheduled to be ready for commercial operation in or about April, 1954.

25. All necessary allocations and directives for the construction of the steam plant, coal recovery plant and associated facilities have been obtained from the United States Government represented by Defense Electric Power Administration, Defense Solid Fuels Administration, Defense Transportation Administration and the National Production Authority.

26. Certificates of necessity with respect to a substantial portion of these facilities have been obtained from the

United States Government represented by Defense Production Administration which has certified these facilities as "necessary in the interest of national defense during the emergency period".

27. Labor, material, engineering, construction and equipment costs have substantially increased, in this period during which construction was prohibited, on account of general inflationary conditions.

28. The cost of construction and equipment of the steam plant, coal recovery plant and associated facilities on the basis of present estimates will exceed by at least $3,100,000 the amount it would have cost Penn Water to construct the same steam plant, coal recovery plant and associated facilities if Penn Water had not been prohibited from construction thereof. Penn Water's business and property have been damaged to the extent of such excess by the aforesaid illegal acts of Consolidated in violation of the antitrust laws.

29. As a result of the prohibition by Consolidated of the construction by Penn Water of its new steam plant, coal recovery plant and associated facilities, Penn Water was prevented from financing the construction of such facilities by the issuance of first mortgage bonds upon the basis of such facilities during a favorable market and will have to finance the construction of such facilities by the issuance of first mortgage bonds at an increased interest cost. As a result of the aforesaid illegal acts of Consolidated in violation of the antitrust laws, Penn Water will therefore incur increased costs of financing and has been damaged in its business and property to the extent of at least $700,000.

30. Increased costs including increased costs of labor, material, engineering, construction and equipment for the construction and equipment of the same steam plant, coal recovery plant and associated facilities, and increased financing costs may be incurred by Penn Water in excess of

the present estimates and Penn Water's business and property have been damaged to the extent of any such additional excess costs which may be incurred by Penn Water by the aforesaid illegal acts of Consolidated in violation of the antitrust laws.

31. As a result of the prohibition by Consolidated of the construction by Penn Water of its new steam plant, coal recovery plant and associated facilities, Penn Water was unable to complete the construction of the steam plant, coal recovery plant and associated facilities in 1951 and has been and will be unable to put the steam plant into commercial operation during the period of approximately two and one-half years from and after November 1951.

32. Penn Water has been prevented by Consolidated's illegal acts in violation of the antitrust laws from generating, transmitting and selling the additional electric energy which would have been produced by such proposed addition to its plant.

33. As a result of Consolidated's aforesaid illegal acts in violation of the antitrust laws, Penn Water has been deprived of the income it would have received from the transmission and sale of energy from the proposed steam plant, and the return to which it would have been entitled upon such facilities.

34. During the period of approximately two and one-half years from and after November 1951 Penn Water would have received earnings and income from the transmission and sale of the output which would have been available if Penn Water had been able to construct the steam plant, coal recovery plant and associated facilities. Penn Water has, therefore, been damaged and injured in its business and property to the extent of at least $1,500,000 by the aforesaid illegal acts of Consolidated in violation of the antitrust laws.

35. In the event that by reason of delay in the completion of the construction and equipment of the steam plant, coal recovery plant and associated facilities, including delay in obtaining labor, material and equipment, Penn Water is unable to complete the construction thereof in order to put the steam plant into commercial operation at the time now estimated, Penn Water will suffer additional damage and injury in its business and property by the illegal acts of Consolidated in violation of the antitrust laws to the extent of loss of earnings and income from the transmission and sale of the output of the steam plant for the period from and after said time until the steam plant is ready for commercial operation.

36. As a result of Consolidated's policy of restraining and controlling Penn Water in violation of the antitrust laws under the Two-Party Agreement, Penn Water retained counsel and by letter dated December 20, 1948 (a copy of which is attached hereto as Exhibit E), advised Consolidated that the Two-Party Agreement was illegal and void as in violation of the antitrust laws, in contravention of the Pennsylvania statutes relating to utilities and contrary to public policy.

37. Penn Water on December 21, 1948, commenced an action (*Pennsylvania Water & Power Company et al.* v. *Consolidated Gas Electric Light and Power Company et al.*, Civil Action No. 4179) in the United States District Court for the District of Maryland to have the Two-Party Agreement declared to be invalid for the reasons stated in said letter.

38. Consolidated by letter dated January 7, 1949 (a copy of which is attached hereto as Exhibit F) notified Penn Water that it refused to recognize the invalidity of the Two-Party Agreement. Consolidated instead insisted upon the validity and enforceability of the Two-Party Agreement and demanded that it be carried out by Penn Water in accordance with its terms.

39. On September 30, 1950 the Court of Appeals for the Fourth Circuit in its decision (Ex. B) declared that the Two-Party Agreement is illegal and invalid, null and void as in violation of the antitrust laws and common law, in contravention of the laws of Pennsylvania and against public policy.

40. After the Fourth Circuit Court of Appeals had decided and found that the Two-Party Agreement was illegal and void, Consolidated refused to recognize the effect of the decision of September 30, 1950 and petitioned the Supreme Court of the United States for a writ of certiorari to review the decision of the Court of Appeals. Certiorari was denied December 11, 1950.

41. After the Supreme Court of the United States had denied Consolidated's petition for a writ of certiorari with respect to the aforesaid decision of the Court of Appeals, Consolidated refused to recognize the effect of the decision. Upon the sending down of the mandate to the District Court for the District of Maryland, Consolidated argued that despite the invalidity of the Basic Agreement of June 1, 1931 (Ex. A-2), the previous agreement of December 31, 1927 between the parties remained in effect.

42. As a result of this contention, additional proceedings were required before the United States Court of Appeals for the Fourth Circuit and that Court had to consider the Two-Party Agreement a second time.

43. The Court rejected the afterthought of Consolidated in its decision of January 10, 1951 (*Penn Water & Power Company, et al.* v. *Consolidated Gas Electric Light & Power Company, et al.*) (Ex. C), and specifically branded and found the contention as only an afterthought, saying (p. 4):

> "It is of great significance that prior to the decision of this court on appeal and the refusal of certiorari by the Supreme Court it never occurred to

any one to suggest that if the 1931 agreement were stricken down, the 1927 agreement would spring into life. Indeed the opposite assumption has been made. Heretofore Consolidated at no time made the contention that even if the 1931 contract were invalidated the 1927 agreement would remain in effect * * *.

"It is obvious that this common assumption of the parties rather than the afterthought of Consolidated presents the true situation prevailing between the parties and the only reasonable answer to the question before the court."

44. By letter dated January 27, 1949 Penn Water notified Consolidated and Safe Harbor that the power contract between them dated June 1, 1931 as amended by supplemental agreements dated August 1, 1932 and November 22, 1939 (the Three-Party Agreement) was invalid, null, void and unenforceable like the Two-Party Agreement because in violation of the antitrust laws, in contravention of the Pennsylvania statutes relating to utilities and contrary to public policy. A copy of said letter is attached hereto as Exhibit G.

45. Consolidated replied to the aforesaid letter by letter dated February 24, 1949 and insisted upon the validity and continued enforceability of the Three-Party Agreement. A copy of such reply by Consolidated is attached hereto as Exhibit H.

46. Even after the aforesaid decisions of the Court of Appeals holding the Two-Party Agreement invalid and despite the statements of Consolidated and the Courts hereinafter set forth as to the like restraints and controls of the Three- and Two-Party Agreements and the integral relationship of these Agreements, Consolidated refused to recognize the illegality of the Three-Party Agreement.

47. The United States Court of Appeals for the Fourth Circuit found in its decision dated September 30, 1950 that

the Three-Party Agreement "complemented" the Two-Party Agreement (Ex. B, p. 25).

48. Counsel for Consolidated stated at the trial of the action on the Two-Party Agreement that the controls imposed upon Safe Harbor by the Three-Party Agreement were of the same nature as those imposed upon Penn Water by the Two-Party Agreement, saying (Transcript of Record, October 5, 1949, page 422):

> "Penn Water has a contract with Safe Harbor, to which we are both parties, and the contract is substantially the same. It is rather anomalous that Penn Water guarantees Safe Harbor, just like we guarantee, Penn Water along with us, and it has the same kind of controls over Safe Harbor that they object to us having. It is almost identical language."

49. Consolidated stated (p. 34 in its brief to the Court of Appeals for the Fourth Circuit in the Two-Party Agreement case) that the Three-Party Agreement was a "sister contract" to the Two-Party Agreement "executed simultaneously with the Basic Agreement [of the Two-Party Agreement]" and (p. 35) "the Basic Agreement [of the Two-Party Agreement] and the supplementary agreement with Safe Harbor [the Three-Party Agreement] are in essence an energy sales contract".

50. After the United States District Court for the District of Maryland on January 17, 1951, pursuant to the mandate of the Court of Appeals, entered its judgment declaring the Two-Party Agreement to be invalid and void, Penn Water asked Consolidated to concede that the Three-Party Agreement was invalid and void for the same reasons as the Two-Party Agreement. Penn Water advised Consolidated that in such event there would be no necessity of litigation by Penn Water to have the illegality of the Three-Party Agreement formally declared by the Court.

51. Despite the recognition by Consolidated of the similarity of the Three-Party Agreement to the invalid Two-Party Agreement, as hereinabove set forth, Consolidated refused to concede its invalidity and persisted in asserting that the Three-Party Agreement was valid, binding and enforceable.

52. Consolidated thereby furthered its policy of exercising restraints and controls over Penn Water and Safe Harbor in violation of the antitrust laws.

53. On January 22, 1951 Penn Water by letter (attached hereto as Exhibit I) advised Consolidated and Safe Harbor that Consolidated's refusal to recognize the invalidity of the Three-Party Agreement compelled Penn Water to institute an action to have the courts declare that Agreement illegal and void for the same reasons as the Two-Party Agreement; and commenced an action in the United States District Court for the District of Maryland on January 22, 1951 to have the Three-Party Agreement judicially declared invalid.

54. Consolidated in its answer dated March 9, 1951 to Penn Water's complaint reiterated its refusal to recognize the invalidity of the Three-Party Agreement and prayed that the Court declare the Agreement to be valid.

55. On May 3, 1951 the United States District Court for the District of Maryland granted Penn Water's motion for summary judgment. The Court in its decision declared the Three-Party Agreement to be illegal and void on the same grounds that the Two-Party Agreement had previously been held by the Court of Appeals for the Fourth Circuit to be illegal and void.

56. The United States District Court for the District of Maryland in its opinion dated May 3, 1951 (97 F. Supp. 952, (Md. 1951)) pointed out that the Fourth Circuit Court

decision invalidating the Two-Party Agreement impliedly also invalidated the Three-Party Agreement and said:

> "It might almost be said that the judgment in the Penn Water case struck down the 3-party agreement as well as the 2-party contract, so closely are the agreements tied together by their terms. The nexus is declared amain by the recitals in the second and third paragraphs of the 2-party agreement, virtually avowing the 2-party to be the master agreement operating the 3-party contract. Article II expressly incorporates Safe Harbor power as an item of the 2-party agreement. The supplement, dated August 1, 1932, to the 3-party contract reaffirms the terms of the latter but in its section Fourth adopts some of the terms of the 2-party agreement. As will be evident upon their discussion, the play of the restrictive covenants in the 3-party agreement reveals this contract as a furtherance of the 2-party plan, extending the 2-party circumscription to the source of the Safe Harbor energy."

57. On May 21, 1951 the District Court entered its judgment that the Three-Party Agreement was illegal and invalid, null and void.

58. After this declaration and judgment by the District Court, Consolidated still refused to concede the invalidity of the Three-Party Agreement and appealed the judgment of the District Court to the Court of Appeals for the Fourth Circuit.

59. That Court in its opinion dated January 3, 1952 (194 F. 2d 89 (4th Cir. 1952)) affirmed the judgment of the District Court and found the Three-Party Agreement to be illegal and void on the same grounds as it had previously held the Two-Party Agreement to be illegal and void.

60. The Court of Appeals stressed the illegal relation of the Two-Party and Three-Party Agreements in its decision of January 3, 1952 and said:

> "That the two basic agreements of June 1, 1931 were parts of the same cooperative plan for the production and distribution of electric energy is too plain for argument. Indeed the three party contract of June 1, 1931 was spoken of by Consolidated in its brief in the prior case as a sister and supplemental contract to the two party contract of the same date, and it was asserted that the provisions of the two agreements were 'inextricably interdependent.' This fact is established beyond dispute by the outline of the activities of the several parties to the two agreements and of the purposes they desired to accomplish by joint action, contained in the preamble of the three party agreement above described; and it is reinforced by the declaration of Consolidated and Penn Water in the preamble of the two-party contract that the Safe Harbor contract was made in accordance with their common intent. Since this is true, it follows as a matter of course that the three party agreement in suit must fall for the reasons set out in our earlier opinion for the invalidation of the companion contract. It is an integral part of an illegal plan which violates the federal anti-trust statutes and the public service laws of the State of Pennsylvania."

61. Despite this further holding of the Fourth Circuit, Consolidated still refused to recognize the previous decisions of the Courts invalidating the Three-Party Agreement and petitioned the Supreme Court of the United States for a writ of certiorari, which was denied, to review the decision of the Court of Appeals affirming the decision of the District Court invalidating the Three-Party Agreement.

62. By reason of Consolidated's refusal to recognize the invalidity of the Two-Party and Three-Party Agreements and its insistence upon performance thereof by Penn Water in furtherance of its policy of control and restraint of Penn Water in violation of the antitrust laws, Penn Water retained counsel and incurred expenses to prosecute the litigations to establish the invalidity of the Two-Party and Three-Party Agreements.

63. The counsel fees and other expenses reasonably incurred by Penn Water in the aforesaid Two- and Three-Party Agreement litigations amounted to $609,137.01, all to the damage and injury to the business and property of Penn Water. A sum measured by the amount of certain of these fees and other expenses is included in the balance due and owing specified in the First Cause of Action herein and a sum measured by the amount of certain of these fees and expenses is included in the suit pending in this Court, Civil No. 4610, by Penn Water against Consolidated for moneys due and owing for services rendered. An amount measured by these fees and expenses is sued for in this Second Cause of Action in the alternative.

64. As a result of the illegal actions of Consolidated complained of in this Second Cause of Action, Penn Water's business and property have been injured in the aggregate amount of at least $5,909,137.01 including an amount measured by the contract invalidation litigation expenses in the amount of $609,137.01 included herein in the alternative. Under the antitrust laws, Penn Water is entitled to recovery from Consolidated threefold the amount of the damages found in this Cause of Action and the costs of the Action including reasonable attorneys' fees.

WHEREFORE, plaintiff demands judgment against defendant either for (a) $17,727,411.03, being threefold $5,909,137.01, the damages sustained with respect to the Second Cause of Action, or in the alternative as this Court

may deem just and proper for (b) threefold $5,909,137.01 less an amount measured by the contract invalidation litigation expenses for which judgment shall have been rendered under the First Cause of Action herein or under the suit pending in this Court, Civil No. 4610, by Penn Water against Consolidated for moneys due and owing for services rendered, and (c) together with any further increased costs of construction and financing and loss of additional earnings as a result of further delay which may be incurred by Penn Water in construction of the steam plant, coal plant and associated facilities, in either case together with interest and costs, including reasonable attorneys' fees with respect to said Second Cause of Action.

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[Filed June 20, 1952]

Exhibit D to the Complaint.

WM. SCHMIDT, JR.
Chairman of the Board and President

CHARLES P. CRANE
Executive Vice-Presid

CONSOLIDATED GAS ELECTRIC LIGHT AND POWER COMPANY
OF BALTIMORE

Baltimore-3, Md.
November 23, 1948.

Mr. J. A. Walls, President,
Pennsylvania Water & Power Company,
Lexington Building,
Baltimore-3, Maryland

Dear Mr. Walls:

As you know, the Operating Committee has been investigating for an extended period the engineering economics of the installation of a steam-electric generating unit at Holtwood as compared with one at Riverside.

I am advised that on Tuesday, November 9, the members of the Operating Committee, although in agreement that additional capacity would be required in 1951, decided that they would be unable to agree upon a joint report as to its location. Accordingly, because of the need for making prompt commitments so as to insure 1951 installation, they decided to submit separate reports and later in the week agreed that these reports should be exchanged on November 16 at 10:00 A.M. Although the report of our member of the Committee was ready, we were informed orally on November 15 and by letter delivered on the afternoon of November 16, that, so far as your member of that Committee was concerned, the Committee was not yet in a position to either present a mutually acceptable recommendation to our Managements in this matter or to advise them of the nature or resultant effects of any differences

that may result from the conclusions of the two members of the Committee. With the above letter voluminous additional data were submitted to us, the joint consideration of which would necessarily consume a great deal of time.

To insure 1951 delivery, we must authorize the turbine manufacturer and steel suppliers to make commitments at once. Further delay is, therefore, out of the question, and after considering all data available, we have decided to proceed at once with the construction of our Riverside Unit No. 4 and with the making of all necessary commitments. This decision precludes our approval of the installation by you of a unit at Holtwood in 1951.

Yours very truly,

(Sgd.) Wm. Schmidt, Jr.
President

Exhibit E to the Complaint.

Pennsylvania Water & Power Company
Lexington Building
Baltimore-3, Md.

December 20, 1948

Consolidated Gas Electric Light
and Power Company of Baltimore,
Lexington Building,
Baltimore 3, Maryland.

Dear Sirs:

We wish to notify you that, pursuant to resolutions adopted by our Board of Directors and for the causes summarized in this letter, we hereby terminate the Agreement between us made up of the following instruments: Agreement as of December 31, 1927; Supplemental Agreement as of December 27, 1928; Supplemental Agreement as of June 1, 1931 (the Basic Agreement); and Supplemental Agree-

ment as of September 29, 1939 (effecting only a rate change).

The Agreement provides for furnishing to you electrical services from our power development at Holtwood, Pennsylvania, and electrical services received by us from Safe Harbor Water Power Corporation at its hydroelectric plant at Safe Harbor, Pennsylvania, and transmitted over our lines, and those of our subsidiary, to you. Notwithstanding our termination of the Basic Agreement, we shall continue to furnish electrical services to you against payment therefor; until further notice, operations to be carried on and payments to be computed as at present.

The Basic Agreement of June 1, 1931 was made at a time when (a) the Chairman of the Board of your company was also the Chairman of the Board of ours; a Vice President and Director of your company was President and a Director of ours; another Vice President of your company was a Director of ours; and another Director of your company was a Vice President and Director of ours, (b) your company had over $150,000,000 of assets and our company had approximately $40,000,000, and (c) your company owned over 12% of our capital stock. This Basic Agreement was never approved or ratified by our stockholders. This interlocking condition was subsequently prohibited by the Federal Power Commission under the Federal Power Act and corrected.

The Basic Agreement provides, in Article V, that we shall obtain your approval before incurring any single commitment for investment in excess of $50,000, with some exceptions, and in Article IV that we shall obtain your approval before entering into any agreement for sale of electrical power and energy or any substantial modification of any such agreement then existing, subject, in either case, to the performance of any duty or obligation to serve imposed on us by charter or otherwise by law. The effect of these provisions as construed in practice was to assure, even after the above interlocking relationship had been eliminated, the placing in your company of managerial

control over our company. You have asserted such managerial control in your answer filed in the current lawsuit between us.

The turning over of such managerial control to another company was and is beyond the corporate authority of this company, *ultra vires,* and contrary to public policy.

The Agreement, with such provisions, constituted and constitutes an agreement in restraint of trade and in suppression of competition in the generation and sale of electrical services, contrary to the laws of the United States and the laws of Maryland and Pennsylvania. Further, the Agreement has been used by you to effect such restraint and suppressions as we shall point out below.

For each and every of the foregoing reasons, the Agreement is null, void and unenforceable.

The Basic Agreement contained another provision, in Article VIII, for cooperation between the two companies to encourage the maximum cooperative utilization of their resources and facilities, the selection of the most suitable equipment and the coordination of their investment programs for additional generating and transmission facilities. It is there provided that for this purpose and for the purpose of insuring that the costs of operation and maintenance of this company's facilities shall be at all times the minimum practical in view of the high standard of service rendered, there shall be an Operating Committee, one member of which is to be appointed by your company and one by us. Such Operating Committee is to investigate, consult and give advice on all operating, engineering and accounting matters pertaining to the interconnected facilities and to the supply and interchange of power and energy. In case of their inability to agree, it is provided that the Operating Committee shall submit the question in dispute to the presidents of our companies for their decision.

It was the intent of the Agreement and the parties thereto that no important step should be taken in relation to the generation, transmission or sale of electrical services

(including the giving or withholding by you pursuant to Articles IV or V of approvals of installations or contracts for the sale of services by this company), until such Operating Committee had consulted in good faith and rendered a report to our two presidents, and, if such report did not record a dispute, then only on the basis of such report or of an agreement between the two presidents, or if such report recorded a dispute, until our two presidents had consulted in good faith and reached a decision. It was further the intent that the members of the Operating Committee and the two presidents should act in a judicial capacity, fairly and without seeking undue benefit for their respective companies. Only if, after following the foregoing procedure in good faith, our two presidents failed to agree, would the provisions of Articles IV and V become applicable.

Your company and our company performed the Agreement in accordance with that intent for a period of many years after the making of the Basic Agreement, thus demonstrating by a long course of dealings the intention of the parties outlined above.

However, in the recent period your company has adopted the policy of avoiding or frustrating proceedings of the Operating Committee and hampering and preventing its consultations and its rendering of reports, and of avoiding bona fide consultations of our two presidents. In pursuance of this policy, you have proceeded in a partisan, non-judicial, unfair manner, and you have ordered or constructed your own major installations and have withheld approval of a major installation proposed by us without following the procedure required by the Agreement, without regard to the interests of the public and in derogation of the interests of this company and for the advantage of your company.

The actions taken by you in pursuance of this policy finally culminated in late November of this year in your breaking off consultations of the Operating Committee on the matter of the construction of additional steam generating facilities to furnish to the public additional electrical

services to be needed in 1951, precluding any report thereon and any consultation and decision by our two presidents thereon. Further, without awaiting consultation and report of the Operating Committee and consultation and decision by the two presidents, you refused approval of the proposal of this company to enter into a commitment with General Electric Company for the construction of such facilities at Holtwood, Pennsylvania, and, instead, yourself, thereafter entered into a commitment for the construction of such facilities in Baltimore, Maryland. You did this notwithstanding that our member of the Operating Committee demonstrated to your member of the Operating Committee that the electrical services to be produced from our proposed additional plant at Holtwood with anthracite river coal free except for dredging would cost the consumer less than the services to be produced from your proposed plant at Baltimore with bituminous coal bought in the market.

These actions by you are not only a restraint of trade and a suppression of competition in the generation and sale of electrical services contrary to the laws of the United States and the laws of Maryland and Pennsylvania, but also constitute a material breach by you of the Agreement between us.

Furthermore, in the absence of any determination of unreasonableness, you have from time to time, in violation of paragraph (c) of Article III of the Basic Agreement of June 1, 1931, refused and failed to pay items billed to you by us and constituting reasonable operating expenses incurred by us until the total of the amounts so withheld by you in violation of the agreement has reached the large sum of over $900,000. This failure to pay such large aggregate sum is oppressive and also constitutes a material breach of the Agreement.

The Board of Directors of this company hereby advises you that it has reviewed the circumstances and events summarized above and that it is its considered view that it is necessary to terminate the contract in order (1) that the

Board and officers of this company can properly carry out their function and duty of managing its business and affairs, (2) that the company can properly exercise its charter powers and its franchises and carry out its public duty, and (3) that restraints of trade and suppression of competition in the generation and sale of electric power can be prevented and the benefits of free generation and sale of electrical services can be secured for the public.

Very truly yours,

PENNSYLVANIA WATER & POWER COMPANY,

By (Signed) PRESCOTT S. BUSH,
Chairman of the Board.

Exhibit F to the Complaint.

CONSOLIDATED GAS ELECTRIC LIGHT AND POWER COMPANY OF BALTIMORE

Baltimore-3, Md.
January
Seventh
1 9 4 9

Pennsylvania Water & Power Company,
Lexington Building,
Baltimore - 3, Maryland.

Gentlemen:

This is to acknowledge receipt of your letter of December 20th, 1948.

We deny that the agreement referred to is null and void and unenforceable or that it has been breached by us.

We deny your right to terminate the contract. We will exercise the rights accorded to us by the contract and will fulfill the obligations thereby imposed upon us. We

demand that you do likewise and that the contract be carried out by you in accordance with its terms.

This letter is not the place in which to discuss the assertions in your letter of December 20th which we likewise deny. They will be dealt with in the litigation in connection with which your letter was written.

In your letter you advise that you will "continue to furnish electrical services to you (us) against payment therefor, until further notice, operations to be carried on and payments to be computed as at present." We repeat that we demand the performance by you of all of the obligations imposed upon you in the contract.

In connection with your continued delivery of power to us, we are willing, in the light of this letter to you, to follow your suggestion and to continue the existing billing and payment procedures without prejudice in the pending litigation. A form of agreement to cover this understanding is enclosed for your approval.

Very truly yours,

/s/ Wm. Schmidt, Jr.
President.

Exhibit G to the Complaint.

Pennsylvania Water & Power Company
Lexington Building
Baltimore-3, Md.

January 27, 1949

Consolidated Gas Electric Light and Power Company
Lexington Building
Baltimore 3, Maryland

Gentlemen:

By letter dated December 20, 1948, we notified you that the agreements between your Company and our Company were null, void and unenforceable because, among other

things, they were beyond the corporate authority of our Company, *ultra vires* and contrary to public policy, constituted an agreement in restraint of trade and in suppression of competition, and imposed restraints on our Company contrary to the laws of the United States and the laws of the Commonwealth of Pennsylvania and the State of Maryland, flowing principally out of the Basic Agreement of June 1, 1931. We further pointed out that such restraints were not only inherent in the agreements but were utilized by you to restrain us in our contractual relations with our customers and in arranging desirable facilities for serving the public.

In accordance with, and as a part of, the plan set out in the above-mentioned Basic Agreement, you and we entered into an agreement dated June 1, 1931, hereinafter called the "Three Party Agreement", and subsequently amended by agreements dated August 1, 1932, September 29, 1939, and November 22, 1939, with Safe Harbor Water Power Corporation, a hydroelectric project to be operated in combination with our plant, wherein were set out corresponding restraints whereby that Corporation, which has assumed obligations to the public, could not on our request expand its facilities or make contractual arrangements for the sale of electric energy without your consent.

The provisions for an Operating Committee in Article XIV of the "Three Party Agreement", among other things, ignored Safe Harbor by not providing for a representative of Safe Harbor on such Committee but only for a representative of your Company and a representative of our Company.

You have recently attempted to use the provisions of the above-mentioned agreements to interfere with contractual arrangements by Safe Harbor, which has a franchise from the Commonwealth of Pennsylvania to provide electric services to other companies as well as to you and to us, for delivery of electric services to Safe Harbor's Pennsylvania customers. You have also attempted to use the provisions

of said agreements to prevent Safe Harbor from installing new facilities desirable for the servicing of its customers.

For the reasons indicated, the "Three Party Agreement" is null, void and unenforceable, and is contrary to the laws of the United States, the Commonwealth of Pennsylvania and the State of Maryland, contrary to public policy and beyond the corporate authority of Safe Harbor and *ultra vires;* furthermore, you have committed breaches of the "Three Party Agreement" by failing to pay sums due and owing thereunder.

Until further notice we shall continue to transmit to you (against payment for such transmission services) two-thirds of the output of Safe Harbor remaining after delivery by Safe Harbor of electric services to customers other than your Company and our Company.

There will be credited to the account of Safe Harbor a proper division of the revenues from the sale of electric services by Safe Harbor and our Company to Pennsylvania customers, and there will be credited to you against your payments for Safe Harbor electric services two-thirds of that division and to us one-third of that division.

Yours very truly,

(Signed) J. A. WALLS
J. A. WALLS
President

cc: Safe Harbor Water Power Corporation

Exhibit H to the Complaint.

WM. SCHMIDT, JR.
Chairman of the Board and President

CHARLES P. CRANE
Executive Vice-Presider

CONSOLIDATED GAS ELECTRIC LIGHT AND POWER COMPANY
OF BALTIMORE

Baltimore–3, Md.

February
Twenty-fourth
1 9 4 9

Pennsylvania Water & Power Company,
Lexington Building,
Baltimore – 3, Maryland.

Gentlemen:

This is to acknowledge receipt of your letter of January 27, 1949 with reference to the "Three Party Agreement" between your Company, this Company, and Safe Harbor Water Power Corporation, dated June 1, 1931, as subsequently amended.

We deny that this Agreement is null and void and unenforceable or that it has been breached by us.

We deny your right to terminate the Agreement. We will exercise the rights accorded to us by the Agreement and will fulfill the obligations thereby imposed upon us. We demand that you do likewise and that the Agreement be carried out by you in accordance with its terms.

We likewise deny the assertions in your letter with respect to our actions and performance under the Agreement.

We further deny your right to limit or restrict in any manner the delivery to us of power and energy generated at Safe Harbor or to dispose of the power and energy generated at Safe Harbor or of its revenues therefrom in any way contrary to the provisions of such Agreement.

We repeat that we demand the performance by you of all of the obligations imposed upon you in the Agreement.

Very truly yours,

WM. SCHMIDT, JR.,
President.

Cc. Safe Harbor Water Power Corporation

Exhibit I to the Complaint.

PENNSYLVANIA WATER & POWER COMPANY

January 22, 1951

Consolidated Gas Electric Light
and Power Company of Baltimore,
Lexington Building,
Baltimore - 3, Maryland.

Gentlemen:

On January 17, 1951, the U. S. District Court of Maryland entered its order declaring the power contracts between us dated December 31, 1927, June 1, 1931 and September 29, 1939 to be void and of no effect, and dissolving the temporary injunction issued by that Court. This order was entered in accordance with the mandate of the U. S. Court of Appeals issued December 14, 1950, and the opinions of that Court dated September 30, 1950 and January 10, 1951.

Since we can no longer operate under contracts held by the Court to be illegal as in violation of the anti-trust laws, the Pennsylvania statutes relating to public utilities, and contrary to public policy, a new arrangement must go into effect.

Accordingly, and assuming you desire to continue to receive service from us and from Susquehanna Trans-

mission Company of Maryland, we will complete the preparation of tariffs and will file these tariffs for such services in the near future.

In this connection we are enclosing a copy of the letter which we have just sent to Safe Harbor Water Power Corporation regarding the invalidity of the Three-Party power contracts between you, that Corporation and this Company, and requesting the filing of tariffs by Safe Harbor. Your attention is called to the last paragraph of the letter relating to payments by us to Safe Harbor.

In view of your refusal to recognize the invalidity of the Three-Party Agreement despite the holding by the Court of Appeals for the Fourth Circuit that the companion Two-Party Agreement with substantially similar provisions and effects was invalid, we are compelled to institute proceedings to have the invalidity of the Three-Party Agreement similarly judicially determined.

We remain willing to discuss with you and Safe Harbor a new overall arrangement made necessary and desirable by the Fourth Circuit Court decision. But, in the meantime, new tariffs are required to form the basis of payment for any electric and transmission services to be rendered by Susquehanna and us to you.

Very truly yours,

J. A. WALLS
President.

Motion for Summary Judgment [Excerpts].

Now comes plaintiff, Pennsylvania Water & Power Company, by its undersigned attorneys, and moves this Court:

Pursuant to Rule 56 of the Federal Rules of Civil Procedure, upon the complaint, the attached affidavit of G. W. Spaulding, subscribed and sworn to July 31, 1952, the exhibits attached to said complaint and affidavit and the

attached affidavit of Wilkie Bushby, subscribed and sworn to July 30, 1952:

* * * * * *

2. As to the second cause of action for:

(a) In the event that this Court shall not grant the application of Penn Water heretofore made for judgment against Consolidated by default, that Consolidated is liable to Penn Water in treble damages under the Federal antitrust laws for injury to Penn Water's business and property due to delay in construction by Penn Water of a new steam electric generating plant, coal plant and associated facilities at Holtwood, Pennsylvania, caused by Consolidated prohibiting Penn Water, in violation of the Federal antitrust laws, from constructing the same, such injury including increased cost of construction, increased financing cost and loss of income, together with interest and costs (including reasonable attorneys' fees in the prosecution of this action) *interlocutory summary judgment* that Consolidated is liable to Penn Water as set forth above in this paragraph (a), on the ground that there is no genuine issue as to any material fact as to such liability and Penn Water is entitled to judgment as a matter of law; and

(b) In the event, and to the extent, that Penn Water shall not recover judgment against Consolidated in the first cause of action herein and the causes of action contained in the companion suit in this Court, Civil Action No. 4610, for amounts billed by Penn Water to Consolidated under a tariff for electric services equal to expenses incurred by Penn Water in having the power contracts between Penn Water and Consolidated, and Penn Water, Consolidated and Safe Harbor Water Power Corporation, declared illegal under the Federal antitrust laws together with interest, *summary judgment* that Consolidated is liable to Penn Water in treble damages under the Federal antitrust laws for injury to Penn Water's business and property, due to expenses of $604,681.63 so incurred by

Penn Water caused by Consolidated insisting on the legality and enforceability of such power contracts as part of an illegal plan which violates the federal antitrust laws, such treble damages being $1,814,044.89, together with interest and costs (including reasonable attorneys' fees in the prosecution of this action); on the ground that there is no genuine issue as to any material fact and Penn Water is entitled to judgment as a matter of law;

* * * * * *

[Filed August 1, 1952.]

Affidavit of G. W. Spaulding Submitted by Plaintiff in Support of Plaintiff's Motion for Summary Judgment [Excerpts].

STATE OF NEW YORK, }
COUNTY OF NEW YORK, } ss.:

G. W. SPAULDING, being duly sworn, deposes and says:

1. I am and have been since 1951 the President of the plaintiff, Pennsylvania Water & Power Company, hereinafter called Penn Water. I had previously been Executive Vice President of Penn Water from June 5, 1947 to November 8, 1951 and a Vice President of Penn Water from August 5, 1943 to June 5, 1947. I have been a director of Penn Water from December 7, 1944 to date. I have personal knowledge of the facts hereinafter set forth.

2. The complaint in this action was filed on June 20, 1952 and was served upon defendant on that date. Defendant's time to answer or move with respect to said complaint expired on July 29, 1952.

3. Penn Water is a public service corporation organized and existing under the laws of the Commonwealth of Pennsylvania, having a principal place of business at

Holtwood in said Commonwealth, and is domiciled in the said Commonwealth of Pennsylvania.

4. Consolidated Gas Electric Light and Power Company of Baltimore (Consolidated) is a public service corporation organized and existing under the laws of the State of Maryland, having its principal place of business in the City of Baltimore, in said State, and is domiciled in the said State of Maryland.

• • • • • •

As to the Second Cause of Action

12. The second cause of action in the complaint seeks recovery from Consolidated of treble damages under the federal antitrust laws for injury to Penn Water's business and property resulting from Consolidated's acts in violation of the federal antitrust laws. Such acts of Consolidated, and the damages to Penn Water resulting therefrom, fall into two categories, viz:

(A) Consolidated prohibited the construction by Penn Water of a new steam electric generating plant, coal plant and associated facilities. The damages to Penn Water consist of increased cost of constructing the plants and associated facilities at a later date, increased cost of financing the construction at a later date, and the loss of income to Penn Water during the period when the plant was not in operation.

(B) Consolidated repeatedly insisted on the legality and enforceability of the power contract between Penn Water and Consolidated, and the power contract between them and Safe Harbor Water Power Corporation (Safe Harbor), each of which was held illegal on its face under the federal antitrust laws by the courts, as part of an illegal plan which violates the federal antitrust laws. The damages to Penn Water consist of the expenses incurred by Penn Water in having the power contracts declared by the courts to be illegal under the federal antitrust laws.

Recovery is sought in this category only in the event, and to the extent, that Penn Water shall not recover judgment against Consolidated in the first cause of action herein and the causes of action contained in the companion suit in this Court, Civil Action No. 4610, for amounts equal to such expenses billed to Consolidated under a tariff for electric services.

A. *With respect to the acts of Consolidated's prohibition of construction by Penn Water.*

13. With respect to the act of Consolidated referred to in Clause (A) in paragraph 12 above, Penn Water has heretofore made application to this Court for judgment against Consolidated by default. In the event such application shall not be granted this motion by Penn Water is for interlocutory summary judgment that Consolidated is liable to Penn Water in treble damages under the federal antitrust laws for injury to Penn Water's business and property due to delay in construction by Penn Water of a new steam electric generating plant, coal plant and associated facilities at Holtwood, Pennsylvania, caused by Consolidated's prohibiting Penn Water, in violation of the federal antitrust laws, from constructing the same, including increased cost of construction, increased financing cost, and loss of income, together with interest and costs (including reasonable attorneys' fees in prosecuting this action), the amount of such damage, interest and costs to be determined by this Court at a later date.

14. This motion for interlocutory summary judgment is based on the adjudication by the Court of Appeals for the Fourth Circuit that Consolidated prohibited the construction by Penn Water of these aforesaid facilities in November 1948 in violation of the antitrust laws. Such adjudication was made in an action relating to a purported power contract between Penn Water and Consolidated, consisting of three agreements dated December 31, 1927, June 1, 1931 and September 29, 1939 (collectively called

the Two-Party Agreement, a copy of which is attached to the Complaint in this action as Exhibits A-1, A-2 and A-3), on September 30, 1950 (184 F. 2d 552 (4th Cir. 1950), cert. den. 340 U. S. 906 (1950)). Pursuant to the aforesaid decision this Court entered its judgment of January 17, 1951 in favor of Penn Water and against Consolidated. A copy of said decision of the Court of Appeals is attached as Exhibit B to the Complaint in this action and the statements therein are incorporated herein with the same force and effect as if fully set forth.

15. Said judgment of this Court, the aforesaid decision of the Court of Appeals and the statements contained therein are *res adjudicata* as between the parties.

16. The Court of Appeals said in its decision of September 30, 1950 as follows (Ex. B to the Complaint, pp. 10-11):

> "The District Judge found and it is not disputed that the effect of the quoted provisions of Articles IV and V of the contract is to confer upon Consolidated the power to control (1) the prices at which Power (Penn Water) may sell its product; (2) the extent to which Power may extend its plant; (3) the territory in which Power may sell its product; and (4) the amount of back feed energy which Power must purchase from Consolidated.
>
> "We are in agreement with this interpretation of the contract. It expressly forbids plant expansion or development by Penn Water without Consolidated's consent; and also forbids the sale of electric energy by Penn Water without Consolidated's approval, and accordingly empowers Consolidated to fix Penn Water's prices. Hence the effect of the contract was to divide between two large power companies a trade territory wherein they would otherwise have been competitors; and to give one of them the power to fix prices for the other and to forbid

plant expansion by the other, however beneficial to the other or to the public interest it might be.

"Consolidated has actually exercised its restrictive powers in approving or disapproving Penn Water's contracts and by prohibiting Penn Water's proposals for plant expansion, notably, a proposal by Penn Water in 1948 for plant expansion at Holtwood whereby coal from the river could be salvaged and power economically produced. At the same time Consolidated erected a new steam plant for itself at Riverside, Maryland.

"It follows that the contract is invalid because it violates Section I of the Sherman Act, 15 U. S. C. A. §1, which provides that every contract in restraint of trade or commerce among the several states is illegal."

17. Consolidated is liable to Penn Water in treble damages under the federal antitrust laws for damages to Penn Water's business and property caused by Consolidated illegally prohibiting Penn Water from constructing its new steam electric generating plant, coal recovery plant and associated facilities, and resulting damages.

18. Penn Water has thereby been damaged in its business and property in that (a) Penn Water has incurred, and will incur, increased costs in the construction and equipment of the aforesaid plants and facilities, (b) Penn Water will incur increased cost of financing the construction of the aforesaid plants and facilities, and (c) Penn Water has suffered, and will suffer, loss of income from the transmission and sale of the output of the aforesaid plants and facilities.

19. Such costs of construction and equipment will have increased approximately $3,100,000. Such costs of financing will have increased approximately $700,000. The income so lost by Penn Water will amount to approximately $1,500,000.

20. (a) Consolidated having filed no responsive pleading or responsive motion to this part of the second cause of action, as required by Rule 12 of the Rules of Civil Procedure, the allegations contained in the Complaint with respect to this part of the second cause of action must be taken as admitted.

(b) There is no genuine issue as to any material fact upon which this motion for interlocutory summary judgment establishing the liability of Consolidated pursuant to Rule 56(c) is based and Penn Water is entitled to interlocutory summary judgment as prayed for as a matter of law.

B. *With respect to the insistence by Consolidated on the legality and enforceability of the power contracts.*

21. With respect to the acts of Consolidated referred to in Clause (B) of paragraph 12 above, this motion by Penn Water is for summary judgment that Consolidated is liable to Penn Water in $1,814,044.89 treble damages under the federal antitrust laws for injury to Penn Water's business and property, due to Consolidated's repeated insistence on the legality and enforceability of the power contract between Penn Water and Consolidated and the power contract between them and Safe Harbor, as part of an illegal plan which violated the federal antitrust laws, which necessitated Penn Water incurring the expense of $604,681.63 for having such contracts held illegal by the courts, together with interest and costs (including reasonable attorneys' fees in prosecuting this action). This motion for summary judgment is based on the adjudication by the Courts of the invalidity of these contracts and the repeated insistence of Consolidated on legality and enforceability as part of an illegal plan violating the federal antitrust laws, which necessitated the retention by Penn Water of counsel and the prosecution of these litigations in the courts and the incurring by Penn Water of expenses in connection therewith. The Court of Appeals for the Fourth Circuit adjudicated between the parties hereto that there

was an illegal plan which violated the federal antitrust laws and that the two power contracts were integral parts of that plan (194 F. 2d 89, Jan. 3, 1952).

22. This motion for summary judgment is in the alternative, in the event, and to the extent, that Penn Water shall not recover judgment against Consolidated in the first cause of action herein and the causes of action contained in the companion suit in this Court, Civil Action No. 4610, for amounts equal to such expenses as described in paragraph 21 hereof billed by Penn Water to Consolidated under a tariff for electric services.

23. In 1948 after the illegal prohibition by Consolidated of the construction by Penn Water of the aforesaid facilities by letter dated November 23, 1948 (copy of which is attached to the Complaint as Exhibit D), Penn Water by letter dated December 20, 1948 (a copy of which is attached to the Complaint as Exhibit E), advised Consolidated that the Two-Party Agreement was illegal and void as in violation of the federal antitrust laws.

24. Penn Water on December 21, 1948, commenced an action (*Pennsylvania Water & Power Company et al.* v. *Consolidated Gas Electric Light and Power Company et al.*, Civil Action No. 4179) in the United States District Court for the District of Maryland to have the Two-Party Agreement declared to be invalid for the reasons stated in said letter.

25. Consolidated by letter dated January 7, 1949 (a copy of which is attached to the Complaint as Exhibit F) notified Penn Water that it refused to recognize the invalidity of the Two-Party Agreement. Consolidated instead insisted upon the legality and enforceability of the Two-Party Agreement and demanded that it be carried out by Penn Water in accordance with its terms.

26. On September 30, 1950 the Court of Appeals for the Fourth Circuit in its decision (Ex. B. to the Complaint)

declared that the Two-Party Agreement was illegal and invalid, null and void as in violation of the federal anti-trust laws.

27. After the Court of Appeals for the Fourth Circuit had held that the Two-Party Agreement was illegal and void, Consolidated petitioned the Supreme Court of the United States for a writ of certiorari to review the decision of the Court of Appeals. Certiorari was denied December 11, 1950.

28. After the Supreme Court of the United States had denied Consolidated's petition for a writ of certiorari with respect to the aforesaid decision of the Court of Appeals, upon the sending down of the mandate to the District Court for the District of Maryland, Consolidated argued that despite the invalidity of the Basic Agreement of June 1, 1931 (Ex. A-2 to the Complaint), the previous agreement of December 31, 1927 between the parties remained in effect.

29. As a result of this contention, additional proceedings were required before the United States Court of Appeals for the Fourth Circuit and that Court had to consider the Two-Party Agreement a second time.

30. The Court rejected the argument of Consolidated in its decision of January 10, 1951 (*Pennsylvania Water & Power Company, et al.* v. *Consolidated Gas Electric Light & Power Company, et al.*) (Ex. C to the Complaint) and said (p. 4):

> "It is of great significance that prior to the decision of this court on appeal and the refusal of certiorari by the Supreme Court it never occurred to any one to suggest that if the 1931 agreement were stricken down, the 1927 agreement would spring into life. Indeed the opposite assumption has been made. Heretofore Consolidated at no time made the contention that even if the 1931 contract were invalidated the 1927 agreement would remain in effect • • •.

"It is obvious that this common assumption of the parties rather than the afterthought of Consolidated presents the true situation prevailing between the parties and the only reasonable answer to the question before the court."

31. By letter dated January 27, 1949 Penn Water notified Consolidated and Safe Harbor that the power contract between the three companies dated June 1, 1931 as amended by supplemental agreements dated August 1, 1932 and November 22, 1939 (the Three-Party Agreement) was invalid, null, void and unenforceable like the Two-Party Agreement because in violation of the federal antitrust laws. A copy of said letter is attached to the Complaint as Exhibit G.

32. Consolidated replied to the aforesaid letter by letter dated February 24, 1949 and insisted upon the legality and continued enforceability of the Three-Party Agreement. A copy of such reply by Consolidated is attached to the Complaint as Exhibit H.

33. After the aforesaid decisions of the Court of Appeals holding the Two-Party Agreement illegal under the federal antitrust laws and despite the statements of Consolidated and the Courts hereinafter set forth as to the like restraints and controls of the Three-Party and Two-Party Agreements and the integral relationship of these Agreements, Consolidated refused to recognize the illegality of the Three-Party Agreement.

34. The United States Court of Appeals for the Fourth Circuit found in its decision dated September 30, 1950 that the Three-Party Agreement "complemented" the Two-Party Agreement (Ex. B to the Complaint p. 25).

35. Counsel for Consolidated stated at the trial of the action on the Two-Party Agreement that the controls imposed upon Safe Harbor by the Three-Party Agreement

were of the same nature as those imposed upon Penn Water by the Two-Party Agreement, saying (Transcript of Record, October 5, 1949, page 422):

> "Penn Water has a contract with Safe Harbor, to which we are both parties, and the contract is substantially the same. It is rather anomalous that Penn Water guarantees Safe Harbor, just like we guarantee, Penn Water along with us, and it has the same kind of controls over Safe Harbor that they object to us having. It is almost identical language."

36. Consolidated stated (p. 34 in its brief to the Court of Appeals for the Fourth Circuit in the Two-Party Agreement case) that the Three-Party Agreement was a "sister contract" to the Two-Party Agreement "executed simultaneously with the Basic Agreement [of the Two-Party Agreement]" and (p. 35) "the Basic Agreement [of the Two-Party Agreement] and the supplementary agreement with Safe Harbor [the Three-Party Agreement] are in essence an energy sales contract."

37. As appears from the annexed affidavit of Wilkie Bushby, Esq., on December 14, 1950, after the Supreme Court of the United States had refused to grant a writ of certiorari to review the decision of the Court of Appeals declaring the Two-Party Agreement illegal, counsel for Penn Water asked counsel for Consolidated whether Consolidated would concede that the Three-Party Agreement was illegal for the same reasons as the Two-Party Agreement, and advised that such a concession would obviate litigation by Penn Water to have the Three-Party Agreement declared illegal; but counsel for Consolidated refused to concede the illegality of the Three-Party Agreement.

As also appears from the annexed affidavit of Wilkie Bushby, Esq., on January 22, 1951, after the United States District Court for the District of Maryland entered its judgment declaring the Two-Party Agreement to be illegal, counsel for Penn Water asked counsel for Consolidated

again whether Consolidated would concede that the Three-Party Agreement was illegal for the same reasons as the Two-Party Agreement and said that, if Consolidated did not concede this, Penn Water would have to institute litigation to have the Three-Party Agreement declared illegal; but counsel for Consolidated again refused to concede the illegality of the Three-Party Agreement.

38. On January 22, 1951 Penn Water by letter (copy attached to the Complaint as Exhibit I) advised Consolidated and Safe Harbor that Consolidated's refusal to recognize the invalidity of the Three-Party Agreement compelled Penn Water to institute an action to have the courts declare that Agreement illegal and void for the same reasons as the Two-Party Agreement; and commenced an action in the United States District Court for the District of Maryland on January 22, 1951 to have the Three-Party Agreement judicially declared invalid.

39. Consolidated in its answer dated March 9, 1951 to Penn Water's complaint reiterated its refusal to recognize the invalidity of the Three-Party Agreement and prayed that the Court declare the Agreement to be valid.

40. On May 3, 1951 the United States District Court for the District of Maryland granted Penn Water's motion for summary judgment in said action. The Court in its decision declared the Three-Party Agreement to be illegal and void on the same ground that the Two-Party Agreement had previously been held by the Court of Appeals for the Fourth Circuit to be illegal and void.

41. The United States District Court for the District of Maryland in its opinion dated May 3, 1951 (97 F. Supp. 952, (Md. 1951)) pointed out that the Fourth Circuit Court decision invalidating the Two-Party Agreement impliedly also invalidated the Three-Party Agreement and said:

> "It might almost be said that the judgment in the Penn Water case struck down the 3-party agree-

ment as well as the 2-party contract, so closely are the agreements tied together by their terms. The nexus is declared amain by the recitals in the second and third paragraphs of the 2-party agreement, virtually avowing the 2-party to be the master agreement operating the 3-party contract. Article II expressly incorporates Safe Harbor power as an item of the 2-party agreement. The supplement, dated August 1, 1932, to the 3-party contract reaffirms the terms of the latter but in its section Fourth adopts some of the terms of the 2-party agreement. As will be evident upon their discussion, the play of the restrictive covenants in the 3-party agreement reveals this contract as a furtherance of the 2-party plan, extending the 2-party circumscription to the source of the Safe Harbor energy."

42. On May 21, 1951 the District Court entered its judgment that the Three-Party Agreement was illegal and invalid, null and void.

43. After this declaration and judgment by the District Court, Consolidated still refused to concede the invalidity of the Three-Party Agreement and appealed the judgment of the District Court to the Court of Appeals for the Fourth Circuit.

44. That Court in its opinion dated January 3, 1952 (194 F. 2d 89 (4th Cir. 1952)) affirmed the judgment of the District Court and found the Three-Party Agreement to be illegal and void on the same grounds as it had previously held the Two-Party Agreement to be illegal and void.

45. The Court of Appeals stressed the illegal relation of the Two-Party and Three-Party Agreements in its decision of January 3, 1952 and said:

"That the two basic agreements of June 1, 1931 were parts of the same cooperative plan for the

production and distribution of electric energy is too plain for argument. Indeed the three party contract of June 1, 1931 was spoken of by Consolidated in its brief in the prior case as a sister and supplemental contract to the two party contract of the same date, and it was asserted that the provisions of the two agreements were 'inextricably interdependent.' This fact is established beyond dispute by the outline of the activities of the several parties to the two agreements and of the purposes they desired to accomplish by joint action, contained in the preamble of the three party agreement above described; and it is reinforced by the declaration of Consolidated and Penn Water in the preamble of the two party contract that the Safe Harbor contract was made in accordance with their common intent. Since this is true, it follows as a matter of course that the three party agreement in suit must fall for the reasons set out in our earlier opinion for the invalidation of the companion contract. It is an integral part of an illegal plan which violates the federal anti-trust statutes and the public service laws of the State of Pennsylvania."

46. After this further holding of the Fourth Circuit, Consolidated still refused to recognize the previous decisions of the Courts invalidating the Three-Party Agreement and petitioned the Supreme Court of the United States for a writ of certiorari to review the decision of the Court of Appeals affirming the decision of the District Court invalidating the Three-Party Agreement. Said petition was denied on June 2, 1952.

47. By reason of Consolidated's refusal to recognize the invalidity of the Two-Party and Three-Party Agreements and its insistence upon performance thereof by Penn Water, Penn Water was compelled to and did retain counsel and was compelled to and did incur expenses to prosecute

the aforesaid litigations to establish the invalidity of the Two-Party and Three-Party Agreements.

48. The counsel fees and other expenses of Penn Water in prosecuting the aforesaid Two- and Three-Party Agreement litigations amounted to $604,681.63. Exhibit IV attached hereto contains an itemization of the vouchers and the amounts paid by Penn Water for services and expenses totaling the aforesaid amount of $604,681.63.

49. All of the decisions of the United States Supreme Court, Court of Appeals for the Fourth Circuit and this Court referred to above are *res judicata* as between Penn Water and Consolidated.

50. There is no genuine issue as to any material fact upon which this motion for summary judgment is based and Penn Water is entitled to summary judgment as prayed for as a matter of law.

• • •

/s/ G. W. Spaulding

[Sworn to July 31, 1952.]

Affidavit of Wilkie Bushby Submitted by Plaintiff in Support of Plaintiff's Motion for Summary Judgment.

STATE OF NEW YORK, }
COUNTY OF NEW YORK, } ss.:

WILKIE BUSHBY, being duly sworn, deposes and says:

1. I am, and have been since November 1948, general counsel for the plaintiff, Pennsylvania Water & Power Company, hereinafter called Penn Water.

2. On December 11, 1950 the Supreme Court of the United States denied certiorari to review the decision of the United States Court of Appeals for the Fourth Circuit declaring the Two-Party Agreement between Penn Water and Consolidated Gas Electric Light and Power Company of Baltimore (Consolidated) illegal.

3. On December 14, 1950 I telephoned to Mr. Alfred P. Ramsey, counsel for Consolidated, and asked him whether Consolidated would now concede that the Three-Party Agreement between Penn Water, Consolidated and Safe Harbor Water Power Corporation (Safe Harbor) was illegal for the same reasons as the Two-Party Agreement between Penn Water and Consolidated and said that, if Consolidated would not concede, Penn Water would be compelled to bring suit to have the Three-Party Agreement declared illegal. Mr. Ramsey replied that Consolidated would not concede the Three-Party Agreement to be illegal.

4. On January 17, 1951 the United States District Court for the District of Maryland, pursuant to the mandate of the Court of Appeals, entered its judgment declaring the Two-Party Agreement between Penn Water and Consolidated to be illegal.

5. On January 22, 1951 I telephoned to Mr. Alfred P. Ramsey, counsel for Consolidated, and asked him again whether Consolidated would concede that the Three-Party Agreement between Penn Water, Consolidated and Safe Harbor was illegal for the same reasons as the Two-Party Agreement and stated that, if the concession were not made, Penn Water would immediately institute suit to have the Three-Party Agreement declared illegal. Mr. Ramsey replied that Consolidated would not concede that the Three-Party Agreement was illegal.

/s/ WILKIE BUSHBY.

[Sworn to July 30, 1952.]

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND.

DOCKET CIVIL ACTION No. 4179.

Excerpt from Consolidated's Notice of Arbitration dated September 1, 1948*.

* * * * * *

9. The following disputes have arisen between Electric [Consolidated] and Power [Penn Water] with respect to the above contracts:

LANCASTER CONTRACT

By letters dated January 24, 1947 and April 28, 1947, Electric requested Power to give eighteen months' notice on or before April 30, 1947 to the Pennsylvania Power & Light Company of the intent to terminate the Lancaster Contract on October 31, 1948 because Electric believed that the rates charged to the Pennsylvania Power & Light Company were too low and that it would be reasonable to increase the rates particularly because the contract does not contain a fuel rate adjustment clause. In order to afford ample time in which to negotiate a new contract, Electric expressed its willingness to approve a renewal agreement for one year from October 31, 1948, providing such renewal agreement contained a limitation on the load supplied by Power.

---

* Exhibit "G" to Penn Water's Complaint in the Two-Party Contract litigation, filed September 28, 1948.

In a letter from Power to Electric, dated May 1, 1947, it stated:

> "We have not considered it advisable to give notice to Pennsylvania Power & Light Company of a desire to terminate the Lancaster Power Supply Contract on October 31, 1948."

Electric notified Power that its failure to give the notice to Pennsylvania Power & Light Company was the entry by Power into an agreement for the sale of electric power and energy to Pennsylvania Power & Light Company for a two-year term beginning November 1, 1948; that it considered this action a violation of Article IV of the Supplemental Agreement between Electric and Power dated June 1, 1931, which obligated Power to secure Electric's approval before entering into such an agreement and therefore it would hold Power liable for all damages which it sustained in consequence of making this agreement.

Power is now engaged in negotiating a new power contract with Pennsylvania Power & Light Company on a basis which is not satisfactory to Electric. It has stated to Electric that when the negotiations are completed it expects that the new contract will "receive your approval in the public interest."

York Contract

The contract of November 15, 1945 between Power and Metropolitan Edison Company provides that at the election of Power the amount of the firm power supplied to Metropolitan may be increased 1,000 kw for each 10,000 kw that the maximum clock one-hour integration of Metropolitan's total requirements during the current month, or any of the prior eleven months, is greater than 275,000 kw and any such increase shall be effective with the current month upon notice to Metropolitan of Power's election prior to the rendition of the bill for such month.

Power notified Electric in January, 1946, July, 1946, and September, 1946, that the increase in Metropolitan's requirements permitted Power to exercise its option to increase the amount of firm power supplied to Metropolitan. In each instance Power was directed by Electric to make the increase.

On February 11, 1947, Power notified Electric of its intention to exercise its option to further increase the amount of firm power supplied Metropolitan. By letter of February 18, 1947, Electric notified Power that it disapproved of the increase because it was short in capacity and the proposed increase would have a definite effect upon its "steam line." Notwithstanding Electric's disapproval Power made the increase. It made further increases in August, 1947, September, 1947, December, 1947, and May, 1948 and has advised Metropolitan that it will make a further increase on September 1, 1948, notwithstanding the express disapproval by Electric of each of these increases.

COATESVILLE CONTRACT

Under date of September 26, 1946, Philadelphia Electric Company addressed the following letter to Pennsylvania Water & Power Company and Safe Harbor Water Power Corporation:

> "Confirming telephone conversation which our Mr. K. M. Irwin had with your Mr. Spaulding, we hereby give notice of our desire to terminate, on March 31, 1948, the agreement between our respective companies, dated August 1, 1933 and the supplements thereto, unless certain changes and modifications, necessitated by conditions in the area supplied, can be made in said agreement."

On October 8, 1946 a copy of this notice was given by Power to Electric and after consideration of the matter Electric wrote Power as follows on January 24, 1947:

> "This agreement will terminate on March 31, 1948, pursuant to the notice contained in the letter from Mr. N. E. Funk, Vice President of Philadelphia Electric Company, dated September 26, 1946.
>
> "Although we feel that the present rates are now too low, we are willing to approve a renewal agreement for one year from March 31, 1948, with the following modifications:
>
> "(a) That the load supplied from the Downington Substation be transferred to the main supply of

the Philadelphia Electric Company and the load area supplied from the Newlinville Substation be enlarged to include the load to the south of the present Coatesville area, as proposed by the Philadelphia Electric Company.

"(b) That a limitation be placed on the load to be supplied by Holtwood Company (Power) under this renewal Agreement."

On June 9, 1947, Electric in a letter to Power disapproved a form of power agreement submitted by Philadelphia Electric Company. Thereafter, in August, 1947, Power, without the knowledge of Electric, entered into an agreement with Philadelphia Electric that the Coatesville Contract of August 1, 1933 could be interpreted to permit the transfer of the load in the eastern part of the Coatesville area to the Philadelphia Electric Company's system and the addition of some of the load of the Chester County Light and Power Company to the supply at Newlinville and, based on this interpretation, permitted the Philadelphia Electric to withdraw its above quoted termination letter dated September 26, 1946.

Under date of September 11, 1947, Power sent to Electric copies of its correspondence with the Philadelphia Electric Company with respect to the above arrangement and in reply Electric advised Power that—

"We dispute your Company's right to enter into the arrangement set out in this correspondence without our consent and to waive the notice of termination, dated September 26, 1946, sent by the Philadelphia Electric Company to your Company and Safe Harbor Water Power Corporation."

10. Generating Equipment.

In December, 1947, Power, without consulting Electric, placed an order with the General Electric Company for a 40,000 kw turbo generating unit to be installed at its Holtwood steam plant. Electric protested the placing of the order as being a violation of Article V of the 1931 Supplemental Agreement above quoted in paragraph 6.

The General Electric Company has not commenced the construction of the turbo generator and Power states that it has the right to cancel the order up to the time that the General Electric Company incurs expense in connection with it. However, in a statement given to the press by Power, it stated that "Its plans call for an ultimate expenditure of $17,000,000 by 1952, $13,000,000 of which will be for extension of the Holtwood steam plant capacity of 40,000 kw and for additional coal recovery and washing facilities. The remaining $4,000,000 covers general improvements to existing facilities."

11. Disputes to Be Settled by Arbitrators.

(1) Lancaster Contract.

(a) Was Power obligated to give to Pennsylvania Power & Light Company the eighteen months' notice of termination, effective October 31, 1948, as requested by Electric.

(b) Is Power liable to Electric for any damages it may sustain as the result of Power's refusal to give the termination notice.

(c) Is Power obligated to act upon Electric's instructions in negotiating a power contract with Pennsylvania Power & Light Company.

(d) Does Electric have the right to disapprove any power contract with Pennsylvania Power & Light Company which Power may negotiate if it contains terms which Electric believes are inimical to its rights under the Agreement between Electric and Power of December 31, 1927 as supplemented by the Supplemental Agreements of June 1, 1931 and September 29, 1939.

(2) York Contract.

(a) Was Power obligated to obtain Electric's approval before increasing the amount of firm power supplied Metropolitan Edison Company.

(b) Is Power liable to Electric for any damages it may sustain as the result of increasing said firm supply notwithstanding Electric's disapproval of such increases.

(3) Coatesville Contract.

(a) Did Power have the right without securing Electric's approval to agree with Philadelphia Electric Company that this contract permitted changes in load.

(b) Did Power, without Electric's consent, have the right to agree with Philadelphia Electric Company that it could withdraw its notice terminating the contract on March 31, 1948.

(c) Is Power liable to Electric for any damages it may sustain as the result of the aforesaid action.

(4) Generating Equipment.

Does Power have the right to incur a commitment for the installation of a turbo-generating unit at its steam plant and associated equipment without first securing the approval of Electric.

• • • • • •

Excerpts from Penn Water's Complaint for Declaratory Judgment, filed September 28, 1948, in the Two-Party Contract Litigation.

• • • • • •

Wherefore, plaintiff demands judgment against the defendant as follows:

• • • • • •

(4) That the Court declare that if the Supplemental Agreement of June 1, 1931 (Exhibit "A-2") should be construed as contended by the defendant, it is against public policy, is unenforceable and void.

• • • • • •

(s) J. A. Walls

J. A. Walls
President, Pennsylvania Water & Power Company

Excerpts from Consolidated's Answer, filed October 15, 1948, to Penn Water's Complaint, dated September 28, 1948, in the Two-Party Contract Litigation.

• • • • • •

the plaintiff (Penn Water) has endeavored to repudiate the control over it vested in the defendant (Consolidated) by said Agreement. In direct contravention of the specific provisions of the Supplemental Agreement of June 1, 1931, and in direct disregard of the specific objections of the defendant, the plaintiff has purported to enter into service contracts with customers in Pennsylvania; has increased the amount of firm power supplied to them, is now negotiating another such contract and has indicated its intention of proceeding with the investment of millions of dollars in additions to its plant in Pennsylvania.

• • • • • •

The said Supplemental Agreements of June 1, 1931 and September 29, 1939, thus in effect constituted a fifty year lease of plaintiff's property to the defendant at a guaranteed annual rental, with the obligation on the part of plaintiff to operate the business subject to managerial approval by defendant of power contracts and plant expansion.

• • • • • •

14. Answering paragraph 24 of the Complaint, the defendant avers that the disputes submitted to arbitration by the defendant all relate to and are determined by the single issue of whether the defendant has the right to direct and control certain actions of the plaintiff,

• • • • • •

Office - Supreme Court, U.S.
FILED
APR 9 1954
HAROLD B. WILLEY, Clerk

No. 682

IN THE

Supreme Court of the United States

OCTOBER TERM, 1953

PENNSYLVANIA WATER & POWER COMPANY,
Petitioner,

against

CONSOLIDATED GAS ELECTRIC LIGHT AND POWER COMPANY OF BALTIMORE,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

BRIEF FOR RESPONDENT IN OPPOSITION

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April 8, 1954

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1953

No. 632

PENNSYLVANIA WATER & POWER COMPANY,
Petitioner,

v.

CONSOLIDATED GAS ELECTRIC LIGHT AND POWER COMPANY OF BALTIMORE,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

The unanimous decision of the Court of Appeals for the Fourth Circuit, affirming the District Court judgment, followed an ancient, a simple and a thoroughly settled principle: if two parties are equally guilty of the same violation of law, neither can recover damages against the other. The classic maxim expressing the principle is *in pari delicto potior est conditio defendentis.* The principle is founded on a public policy to deny damages to the wrongdoer, not for the benefit of the defendant, but in order that the making of illegal bargains may be discouraged.

That the illegality of the contract in suit lay in violation of the Sherman Act does not change the general rule nor justify any review here. Over twenty-five years ago, this Court in the *Eastman Kodak* case (273 U. S. 359) held that the general rule of *in pari delicto* was applicable

to treble damage actions under the antitrust laws. The lower federal courts have consistently so held for over fifty years.

It is a significant feature of the case at bar that it was the participation of *petitioner* in the contract which made that contract illegal. There were only two parties—petitioner and respondent—to the illegal contract on which this action is founded. Respondent could not *alone* have made any "contract, combination . . . or conspiracy in restraint of trade." It was the fact of *agreement* between *petitioner* and respondent which constituted a violation of the Sherman Act.

Petitioner attempts to build up a conflict between the decision below and the decisions of this Court in the *Mandeville Island Farms* (334 U. S. 219), the *Kiefer-Stewart* (340 U. S. 211) and the *Moore* (340 U. S. 944) cases. No such conflict exists. The cited cases in this Court stand only for the proposition that it is no defense to a treble damage action for violation of the Sherman Act that plaintiff has been guilty of some *other* violation of the Sherman Act. The Court of Appeals fully accepted this proposition, but pointed out the obvious difference between the case at bar and the cited decisions of this Court: ". . . in none of them were the plaintiff and the defendant parties to the *same* illegal conspiracy or agreement on which the suit was based" (2 R. 236; italics ours).

(The complete record on which this case was decided below has not been printed, 2 R. 241. Page references herein preceded by "1 R." are to petitioner's printed appendix in the Court of Appeals; page references preceded by "2 R." are to respondent's printed appendix in the Court of Appeals, with which are incorporated the proceedings in the Court of Appeals.)

There is no conflict between the decision below and any other decision in the federal judicial system. Petitioner

does not, and cannot, point to a single case where any court has permitted recovery for violation of the Sherman Act by a plaintiff equally guilty of the *same* violation alleged against defendant. We confidently assert that no such case exists.

The petition, while claiming that "the sole issue in this case is one of law" (p. 2), nevertheless urges two matters of fact on which both the District Court and the Court of Appeals found against petitioner.

The first factual matter is the assertion that petitioner signed the illegal contract "when under domination of persons in control of Consolidated" (Petition, p. 1; petitioner does not suggest that it was ever under the domination of *respondent*). As to any claim of duress, it may be said that (a) no such claim was made below, (b) no such claim is presented by the petition (see p. 4), and (c) the Court of Appeals specifically found that petitioner "entered the agreement in the first place *voluntarily* on equal footing with Consolidated" (2 R. 239; italics ours). The Court of Appeals further specifically found (2 R. 238):

> "There was neither duress nor compulsion in the execution of the contract of June 1, 1931 between the parties to the instant suit."

The second factual matter relied on by petitioner is the contention that it timely repudiated the illegal agreement. As to this, the Court of Appeals, affirming the District Court, specifically found (2 R. 238-239):

> "The contention is not tenable under the facts of the case."

The petition presents no issue appropriate for review by this Court.

Opinions Below.

The opinion of the District Court (1 R. 1) is as yet unreported. The unanimous opinion of the Court of Appeals (2 R. 234) is reported at 209 F. 2d 131.

Jurisdiction.

The jurisdictional requisites are adequately set forth in the petition.

Questions Presented.

1. May one of two equally guilty parties to a contract between them alone in violation of the Sherman Act recover from the other party damages alleged to result from the illegal contract?

2. On the facts in the case at bar, did petitioner timely repudiate the illegal contract so that it may recover treble damages even though petitioner and respondent were the only parties to the illegal contract and were equally guilty of a violation of law?

Statutes Involved.

Section 1 of the Sherman Act, as amended (15 U. S. C. § 1):

> "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal . . . ."

Section 7 of the Sherman Act (26 Stat. 210):

> "Any person who shall be injured in his business or property by any other person or corporation by reason of anything forbidden or declared to be unlawful by this act, may sue therefor in any circuit

court of the United States in the district in which the defendant resides or is found, without respect to the amount in controversy, and shall recover three fold the damages by him sustained, and the costs of suit, including a reasonable attorney's fee."

Section 4 of the Clayton Act (38 Stat. 731, 15 U. S. C. § 15):

> "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

Statement.

From 1910 until about 1938, petitioner Penn Water and respondent Consolidated were both under the control of the same financial group (2 R. 60-61). Consolidated is a larger company than Penn Water, as the latter is at some pains to emphasize (Petition, p. 5), but the difference in size is of no significance here. Control of Consolidated had been obtained by the Penn Water financial group in order to enable Penn Water to sell to Consolidated its hydro-electric power, by nature variable in amount (2 R. 60-61). There was a strong incentive for this group to favor Penn Water over Consolidated. The rates of Penn Water on sales to Consolidated were subject to no regulation, state or federal, until the passage in 1935 of Part II of the Federal Power Act (16 U. S. C. §§ 824-825); such sales to Consolidated were interstate and were not subject to state regulation under the *Attleboro* case (273 U. S. 83). On the other hand, Consolidated's rate of return was at all times subject to regulation by the Maryland Public Service Commission (2 R. 62).

Under date of June 1, 1931, Penn Water and Consolidated entered into the long-term contract (2 R. 1-14) which was filed in 1936 as Penn Water's rate schedule under the Federal Power Act and was later found to be in violation of the Sherman Act. The contract provided for delivery of power to Consolidated (2 R. 2), for payment by Consolidated of all operating expenses of Penn Water (2 R. 5), for payment by Consolidated to Penn Water of a fixed return on Penn Water's then existing plant, and for payment by Consolidated to Penn Water of a return of 10¼% (later reduced to 9½%) on any subsequent additions by Penn Water to its plant (2 R. 4-5).

Because the contract thus required Consolidated to pay the guaranteed return on any additions by Penn Water to its plant (as well as the operating costs, depreciation and taxes), the contract also required that Consolidated approve any addition on which it was to pay the return (2 R. 8).

As already mentioned, the Courts below found as a fact that the illegal contract was *voluntarily* made by Penn Water and that there was no duress or compulsion by Consolidated (2 R. 239, 1 R. 4).

Indeed, the illegal contract was for the benefit of Penn Water and for over seventeen years Penn Water received without question all the benefits of the contract, including the guaranteed high rate of return (2 R. 239).

In the autumn of 1948, however, disagreements arose between the parties over the question, among others, whether additional generating capacity needed for 1951 should be obtained by Consolidated adding a new unit or by Penn Water doing so (2 R. 200).

Consolidated invoked arbitration provisions in the contract to settle these disagreements (2 R. 136-137).

On September 28, 1948, Penn Water commenced an action in the District Court for a declaratory judgment that the arbitration provisions were unenforceable (2 R.

126-140). Penn Water did not in any way repudiate or withdraw from the contract or even mention a possible violation of the Sherman Act (see 2 R. 138-139). Penn Water was continuing to insist on Consolidated's approval under the contract of the new unit proposed by Penn Water, this in order to obligate Consolidated to pay Penn Water the contract rate of return thereon. As found in the Courts below (2 R. 235):

> "Penn Water, however, did not repudiate the agreement at this time, but continued to press its views upon the operating committee set up by the agreement."

On November 16, 1948, Penn Water, acting under the agreement as one in full force and effect and insisting on action by Consolidated under the agreement, submitted voluminous reports (2 R. 118-124) to the operating committee on the question of the needed additional capacity; at the same time Penn Water asked for further delay to submit other reports.

On November 23, 1948, Consolidated wrote (1 R. 24-25) that, because the additional capacity had to be ready by 1951, it could not delay further its own construction plans and in consequence could not approve the construction of a new plant by Penn Water for installation in 1951.

The complaint in the case at bar relies on this letter of November 23, 1948 as the violation by Consolidated of the Sherman Act giving rise to the alleged cause of action (Petition, p. 6). Whatever be the effect of the letter, it is perfectly clear that it was written *before* Penn Water had repudiated the agreement, either for violation of the Sherman Act or for any other reason.

In December 1948, however, a sudden and drastic change took place in the attitude of Penn Water toward the 1931 contract. Penn Water suddenly notified Consolidated on December 20, 1948 that it was terminating the contract

because the contract was in restraint of trade (1 R. 25-30). The next day, Penn Water filed an amended complaint in the District Court asking a declaratory judgment that the 1931 contract be nullified as in violation of the Sherman Act (2 R. 140-158).

The reason for this sudden discovery of the Sherman Act by Penn Water is not hard to find. A decision of the Federal Power Commission was just about to be handed down in a case involving Penn Water's rates and a substantial reduction in those rates was anticipated. It seems evident that Penn Water hoped, by nullifying the 1931 contract, to nullify the anticipated rate reduction and (if by nullifying the contract it could destroy the integrated interstate power pool) also to escape Federal Power Commission jurisdiction (see 2 R. 162-164).

The decision of the Federal Power Commission did come down on January 5, 1949 (8 F. P. C. 1) and it did substantially reduce Penn Water's rates.

Thereafter, it was finally decided that the 1931 contract between Penn Water and Consolidated was in violation of the Sherman Act. The reasoning was that the parties were potential competitors in the sale of electric power but that "[f]ree and unrestricted competition between the utilities is, however, impossible by reason of their contractual relations."

> *Pennsylvania Water & Power Company* v. *Consolidated Gas Electric Light and Power Company of Baltimore,* 184 F. 2d 552 at 556 (4th Cir. 1950), cert. denied, 340 U. S. 906 (1950).

Penn Water then attempted to use this decision for the very purpose by it intended—namely, to avoid the rate reduction. On certiorari in this Court from the order sustaining the Federal Power Commission rate reduction, Penn Water, as the Court of Appeals in the case at bar noted, made an argument that the Commission was without juris-

diction because "the proceeding involved . . . the continued performance of an agreement which had been declared illegal . . ." (2 R. 236).

The argument of Penn Water to escape a rate reduction because of the illegality of the agreement was rejected by this Court.

Pennsylvania Water & Power Company v. *Federal Power Commission*, 343 U. S. 414 (1952).

As Mr. Justice BLACK remarked, Penn Water "tried to utilize a violation of the Sherman Act so as to nullify a rate reduction order" (343 U. S. at 424).

This Court referred to the benefits to Penn Water from the 1931 contract and pointed to evidence "that from 1936 through 1945 Penn Water's dividends on its common stock had never been less than 25% of the cash paid in on the stock" (343 U. S. at 416).

The decision of this Court upholding the rate reduction was handed down on May 26, 1952, and within less than one month the case at bar for treble damages was commenced (2 R. 140-148).

The complaint (1 R. 9-23) proceeds on the theory that by its letter of November 23, 1948 Consolidated made impossible the construction of a new plant by Penn Water, that the new plant could not be built until the 1931 agreement was judicially declared invalid, and that the delay while this question was being litigated caused damage to Penn Water in loss of profits and because construction and financing costs meanwhile increased.

Consolidated contended below that, while admittedly it wrote the November 23, 1948 letter, it never prohibited (in the sense that it made impossible) the construction of a new plant by Penn Water; that Penn Water was free at all times to build the new plant but delayed doing so for *other* reasons than the existence of the 1931 contract; that Consolidated could not be liable for any delay due to Penn

Water's preference to obtain a judicial decision before commencing construction; and that in any event Penn Water, being equally guilty of the same violation of the Sherman Act charged to Consolidated, could not recover in the action.

Penn Water moved in the District Court for interlocutory summary judgment on the ground that the judgment in the prior contract litigation (184 F. 2d 552) was *res judicata* of every question except the amount of damages (1 R. 36-51). The District Court denied Penn Water's motion and directed entry of judgment for Consolidated because Penn Water was equally guilty of the same violation of the Sherman Act (1 R. 8). The District Judge was Honorable ALBERT V. BRYAN who had theretofore, in related litigation, dealt with a contract (the "three-party" agreement) between the parties and Safe Harbor Water Power Corporation (97 F. Supp. 952, affirmed, 194 F. 2d 89, cert. denied, 343 U. S. 963). The voluminous record before Judge BRYAN in the case at bar included the record in the earlier action in which the "two-party" 1931 contract was held invalid (2 R. 30, 89 F. Supp. 452, reversed, 184 F. 2d 552, cert. denied, 340 U. S. 906).

The judgment of the District Court was unanimously affirmed in the Court of Appeals (2 R. 240).

The opinion of the Court of Appeals dealt only with the defense of *in pari delicto*. Petitioner states (Petition, p. 1) that "all the basic allegations" in the complaint were decided in petitioner's favor, except for the defense of *in pari delicto*. This is not an accurate statement. The Court of Appeals did not decide in the case at bar whether in fact respondent had delayed construction of the new plant, nor did the Court of Appeals decide the extent of the *res judicata* effect of its earlier decision invalidating the contract. The Court of Appeals properly disposed of the case on the sole basis that petitioner was guilty of the same violation of law as respondent.

Both the Courts below found that respondent had acted properly in litigating the validity of the 1931 contract. The District Court found (1 R. 7) that the delay was "attributable to bona fide litigation of the validity of the agreement, a real and substantial controversy". This language was specifically approved by the Court of Appeals, which further noted (2 R. 239):

> "It was not practicable to discontinue and abolish this structure instantaneously and at the point of time when Penn Water became dissatisfied. The questions of law involved were not free from difficulty and were not finally concluded until there had been protracted litigation in several courts."

What petitioner has attempted in the case at bar is to penalize respondent simply because respondent exercised its right to defend the 1931 contract before the courts.

POINT I.

The case at bar does not involve any unsettled question of federal law nor any conflict of decisions.

(a) The unbroken course of decision over a span of fifty years.

The public interest does not require restatement by this Court of a rule of law which has been clearly and correctly stated and applied by the federal courts from at least 1900 to the present. The courts below were clearly correct in their application of the principle that there may be no recovery of treble damages under the antitrust laws by a plaintiff who is equally guilty of the same violation for which he sues and who has brought upon himself the damage which he alleges.

Eastman Kodak Co. v. *Southern Photo Materials Co.*, 273 U. S. 359 (1927);

Singer v. *A. Hollander & Son,* 202 F. 2d 55, 60 (3d Cir. 1953);
Ring v. *Spina,* 148 F. 2d 647 (2d Cir. 1945);
Northwestern Oil Co. v. *Socony-Vacuum Oil Co.,* 138 F. 2d 967 (7th Cir. 1943), cert. denied, 321 U. S. 792 (1944);
Tilden v. *Quaker Oats,* 1 F. 2d 160 (7th Cir. 1924);
Eastman Kodak Co. v. *Blackmore,* 277 Fed. 694 (2d Cir. 1921);
Victor Talking Machine Co. v. *Kemeny,* 271 Fed. 810 (3d Cir. 1921);
Bluefields S. S. Co. v. *United Fruit Co.,* 243 Fed. 1 (3d Cir. 1917), writ of error dismissed on stipulation 248 U. S. 595 (1919);
Allgair v. *Glenmore Distilleries Co.,* 91 F. Supp. 93 (S. D. N. Y. 1950);
Mid-West Theatres Co. v. *Co-Operative Theatres of Michigan, Inc.,* 43 F. Supp. 216 (E. D. Mich. 1941);
Morny v. *Western Union Telegraph Co.,* 40 F. Supp. 193, 200-201 (S. D. N. Y. 1940);
Bishop v. *American Preservers Co.,* 105 Fed. 845 (Cir. Ct. N. D. Ill. 1900).

This Court many years ago examined the early cases and stated in a unanimous opinion:

> "The principle to be extracted from all the cases is, that the law will not lend its support to a claim founded upon its violation."
>
> *Coppell* v. *Hall,* 7 Wall. 542, 559 (1868).

This Court, in an action for treble damages under the antitrust laws, approved instructions to the jury in substance as follows:

> ". . . that if, during the preceding period in which the plaintiff had been a customer of the defendant,

it had not merely bought goods from the defendant because of a business necessity, but, with a knowledge of the defendant's purpose to monopolize, had knowingly and willfully helped to build up the monopoly, it was *in pari delicto,* and hence could not recover any damages whatever on account of the defendant's refusal to continue to sell it goods."

Eastman Kodak Co. v. *Southern Photo Materials Co.,* 273 U. S. 359, 377 (1927).

The governing principle has been succinctly stated by the Second Circuit in a treble damage action under the antitrust laws:

"Where the parties stand actually and truly in pari delicto, the law should leave them where it finds them."

Ring v. *Spina,* 148 F. 2d 647 (2d Cir. 1945).

The Third Circuit has so held:

"If the Sherman Act was violated by the combination in which the Bluefields Company participated, and injury to that company was a natural consequence, then the case comes within the well settled principle that where a criminal combination is made or a criminal enterprise is undertaken by two parties and *either* party violates the agreement with injury to the other, the law will afford the injured party no redress but will leave him as it finds him. In pari delicto potior est conditio defendentis."

Bluefields S. S. Co. v. *United Fruit Co.,* 243 Fed. 1, 18 (3d Cir. 1917), writ of error dismissed on stipulation 248 U. S. 595 (1919).

The Seventh Circuit, in an action for treble damages under the antitrust laws, affirmed a judgment entered on a directed verdict for defendants. The first ground for an affirmance was failure to prove damages. The second ground for affirmance was stated as follows:

> ". . . the court would have been justified in directing a verdict upon the second ground, namely, that plaintiff participated in the illegal conspiracy. This combination was stamped with disapproval by the Supreme Court in United States v. Socony-Vacuum Oil Co., supra, 310 U. S. at page 221, 60 S. Ct. at page 843, 84 L. Ed. 1129, in these words: '• • • Under the Sherman Act a combination formed for the purpose and with the effect of raising, depressing, fixing, pegging, or stabilizing the price of a commodity in interstate or foreign commerce is illegal per se.'
>
> "Having participated in this illegal undertaking, plaintiff may not recover; where parties stand in pari delicto, the law leaves them where it finds them."
>
> *Northwestern Oil Co.* v. *Socony-Vacuum Oil Co.*, 138 F. 2d 967, 971 (7th Cir. 1943); cert. denied, 321 U. S. 792 (1944).

(b) The *Mandeville Island Farms*, the *Kiefer-Stewart* and the *Moore* cases.

There is no substance to Penn Water's contention that a theretofore settled question of federal law was unsettled by the decisions of this Court in the *Mandeville Island Farms*, the *Kiefer-Stewart* and the *Moore* cases. The Court was not concerned in those cases with factual situations in which the litigants were equally guilty of the same violation on which the action was based.

So inapposite was the defense of *in pari delicto* in the *Mandeville Island Farms* case that this Court in its opinion did not even mention the possibility that plaintiffs might themselves be equally guilty. Indeed, defendant in *Mandeville Island Farms* did not argue in this Court that plaintiffs were *in pari delicto* and in effect conceded that the District Court had erred in holding that the plaintiffs were *in pari delicto* (Respondent's Brief in Opposition to Petition for Certiorari, p. 30; Petitioner's Brief, p. 60). The

Kiefer-Stewart and *Moore* cases are equally inapposite: this Court held that the plaintiffs were not barred because of their claimed participation in *other* conspiracies than those of which they complained.

Mandeville Island Farms, Inc. v. American Crystal Sugar Co., 334 U. S. 219 (1948):

The action was for treble damages by growers of sugar beets against a beet sugar refiner. The claimed violation of the Sherman Act consisted of an agreement between defendant and two other beet sugar refiners to pay uniform prices to beet growers. Plaintiff growers were not parties to this agreement; indeed the agreement was directed against the growers. Plaintiff growers did not found their claim upon any illegal contract to which they were parties. The growers complained because, as this Court stated in its opinion, "*the three refiners* entered into an agreement to pay uniform prices for sugar beets" (334 U. S. at 223; italics ours).

The District Court dismissed the complaint on the ground that the alleged conspiracy did not affect interstate commerce. The District Court added that recovery was also precluded because plaintiffs "are in effect co-conspirators" (64 F. Supp. 265, 267). In affirming the judgment of the District Court, the Court of Appeals stated that it was not deciding whether plaintiffs were *in pari delicto* (159 F. 2d 71, 72).

In reversing the judgment for defendant, this Court held that the alleged restraints affected interstate commerce and hence were within the sweep of the Sherman Act. There was no mention in this Court's opinion of the doctrine of *in pari delicto* or of the possibility that the beet growers might be deemed as guilty as the refiners of the violation of the antitrust laws.

It is true that the beet growers sold their beets to defendant refiner at the uniform price fixed by defendant

refiner and its co-conspirators, but this Court nowhere indicated a view that the growers were parties to the illegal agreement among the refiners. In any event, the growers could not be *in pari delicto* with the refiners who made the illegal agreement because these refiners were the only possible purchasers of the beets grown by plaintiffs and the resulting economic coercion is clear.

Kiefer-Stewart Co. v. Joseph E. Seagram & Co., Inc., 340 U. S. 211 (1951):

Seagram and Calvert agreed not to sell liquor to plaintiff, a liquor wholesaler, unless plaintiff agreed to adhere to maximum resale prices fixed by Seagram and Calvert. Plaintiff refused to follow the maximum resale prices and defendants thereupon refused to sell to plaintiff. Defendants argued in defense to plaintiff's claim for treble damages under the Sherman Act that plaintiff had joined "other Indiana wholesalers" (340 U. S. at 214) in an illegal agreement fixing minimum prices.

In this Court on certiorari, neither plaintiff nor defendants nor the United States (appearing as *amicus curiae*) argued the defense of *in pari delicto*. Defendants' argument was that their conduct was lawful because it was motivated by plaintiff's illegal conspiracy with *other* Indiana liquor wholesalers. Defendants also argued that they did not wish to sell goods to plaintiff to be resold in violation of law. Plaintiff's reply to these arguments was that plaintiff's participation in a *separate* and *different* conspiracy could not excuse a violation of law by defendants. This Court so held.

Moore v. Meade Service Co., 340 U. S. 944 (1951):

Moore operated the only bakery in the town of Santa Rosa, New Mexico. A group of Santa Rosa businessmen, in an effort to dissuade Moore from moving his bakery out

of the community, obtained the written assurance of Santa Rosa retail outlets that they would not purchase bread from anyone but Moore. As the Court of Appeals for the Tenth Circuit later observed, this agreement was an "illegal boycott" (190 F. 2d at 541). On the day that this illegal agreement was to become effective, Meade, a competitor from a nearby town, reduced the retail price of its bread in Santa Rosa to a point well below its cost and did not reduce the price of its product elsewhere. The result was that Santa Rosa retailers continued their purchases of Meade bread.

The Court of Appeals for the Tenth Circuit affirmed the dismissal of the action which Moore had brought against Meade for treble damages based upon alleged violations of the Robinson-Patman Act (184 F. 2d 338). The ground of decision was that Moore's damages were the result of his own participation in an illegal undertaking. This Court summarily vacated the judgment of the Court of Appeals and remanded the case to that court for further consideration in the light of the *Kiefer-Stewart* decision, which had been handed down subsequent to the decision of the Court of Appeals. On remand (190 F. 2d 540, cert. denied, 342 U. S. 902), the Court of Appeals held that it was no defense to Moore's complaint against Meade's retaliatory but nevertheless illegal discriminatory prices that Moore was himself a party to *another* and *different* illegal scheme.

(c) Decisions of the District Courts.

The claimed conflict with four District Court decisions (Petition, pp. 14-16) is non-existent. In any event, we do not see any indication in this Court's Rule 38 that a conflict between a Court of Appeals decision and a District Court decision will move this Court to grant certiorari.

The facts in the four District Court decisions claimed to be "conflicting" were entirely different from those in the case at bar. There was no claim in any one of them that plaintiff and defendant were equally guilty of the *same* violation of law.

In the *Red Rock* case from the Northern District of Georgia (Petition, p. 14), there is no reported opinion but an incomplete abstract appears as Appendix B to the petition. This abstract includes a reference to some of the facts and the following quotation from the opinion (p. 2b):

> "Under these circumstances, it can not be said that the plaintiff and defendants were in equal fault . . .".

The District Court thus rejected the defense of *in pari delicto,* not because it was inapplicable in antitrust cases, but because on the facts there was no "equal fault".

There is no conflict with *Fanchon & Marco* v. *Paramount Pictures,* 100 F. Supp. 87 (S. D. Cal. 1951) because that decision specifically found:

> "There has been no violation of the antitrust laws by the defendants which has resulted in actionable injury to the plaintiff" (104 F. Supp. at 104).

There is no conflict with *Trebuhs Realty Co.* v. *News Syndicate Co.,* 107 F. Supp. 595 (S. D. N. Y. 1952), an action directed against an alleged conspiracy in the sale of newspaper advertising space. The District Court properly struck a defense that plaintiffs were parties to a wholly *separate* and *unrelated* conspiracy to monopolize the legitimate theatre industry.

There is no conflict with *Interborough News Co.* v. *Curtis Publishing Co.,* 108 F. Supp. 768 (S. D. N. Y. 1952), an action based on a refusal to sell magazines to plaintiff. The District Court properly struck the unrelated defense that plaintiff had acquired an unlawful monopoly over the wholesale distribution of magazines.

(d) The "plain meaning" of the statute and the legislative history of the Sherman Act.

The short and complete answer to Penn Water's arguments (Petition, pp. 8-10) based upon the "plain meaning"

of Section 7 of the Sherman Act and its legislative history is that the arguments come more than fifty years too late. The arguments have no more to commend them now than they did when the courts first sustained the defense of *in pari delicto* in treble damage actions in the early years of the Sherman Act.

Petitioner mistakes the "plain meaning" of Section 7 of the Sherman Act when it argues that "Any person" includes even a person who is *in pari delicto*. Such a person is injured not "by any other person or corporation", but by his own participation in the illegal scheme.

The argument is also mistaken in its assumption that Congress would not have been explicit had it intended to repudiate the great body of ancient learning inherent in the maxim *in pari delicto potior est conditio defendentis*. That body of learning was not new in 1890 and had been pithily summarized a century before by Lord Kenyon, who "would not sit to take an account between two robbers on Hounslow Heath" and whose words were quoted with approval by this Court.

> *McMullen* v. *Hoffman*, 174 U. S. 639, 654 (1899).

Petitioner appears to argue (Petition, p. 9) that Congress specifically rejected the defense of *in pari delicto* when it enacted the Sherman Act. The suggestion is startling; it has never been mentioned in any of the numerous cited decisions discussing the defense in Sherman Act treble damage cases. The argument is based on a mistake of fact as to legislative history. The bills rejected by Congress, mentioned in the petition (p. 9) and the Appendix thereto, did not involve the defense of *in pari delicto*. They involved proposed defenses going much further than the normal *in pari delicto* defense.

The most moderate of the rejected bills (*e.g.*, S. 3476, H. R. 11279, 50th Cong., 1st Sess.; S. 6, H. R. 509, 51st Cong., 1st Sess.) would have made it a defense to a treble

damage action that the plaintiff was violating the antitrust laws *in any connection,* whether or not related to the violation in suit. Others of the rejected bills (*e.g.,* H. R. 202, H. R. 3844, 51st Cong., 1st Sess.) were bills of outlawry. They would have made it unlawful for a violator of the antitrust laws to maintain *any* action of *any* kind in *any* court, federal or state. They would have cancelled the charter of any corporation which violated the antitrust laws.

The kind of defenses in the proposed bills thus rejected by Congress make it clear that there was no purpose to foreclose the normal defense based on participation of the plaintiff in the *same* violation for which he sues.

POINT II.

Public policy supports the decision below.

The petition (p. 2) suggests that the decision below is wrong because "of the public policy of the antitrust laws to encourage such suits as a deterrent to future violations".

Elsewhere in the petition (p. 2) it is said that "private considerations are out of place in an antitrust damage suit".

Petitioner attempts to invoke "the overriding public interest in enforcing these provisions as a deterrent to future violations" (Petition, p. 10).

It is stressed that the public interest is affected by the claim for treble damages (Petition, p. 16).

Respondent does not deny that private actions for treble damages under the Sherman Act do involve considerations of public policy. Respondent asserts, however, that the decision below gave full effect to public policy.

Truly, it is in the public interest to deter violations of the Sherman Act. Is this accomplished, however, by permitting a person guilty of such violations to recover damages? This Court and the lower federal courts have

for over fifty years answered in the negative. The reasoning has always been that, if a business man understands he may make an agreement in violation of the Sherman Act but may nevertheless recover treble any damages he may sustain thereby, the making of such illegal agreements is encouraged.

The most concise statement of the public policy which denies damages to a wrongdoer is that contained in Professor Williston's treatise on Contracts:

> "To deny a wrongdoer damages or the return or value of his performance, though an equally guilty defendant thereby escapes punishment and may be enriched, tends to diminish the number of illegal bargains."
>
> *Williston, Contracts* (Revised Ed.) Vol. 5, p. 4562.

The course of the several suits between Penn Water and Consolidated demonstrates that the defense of *in pari delicto* does not diminish the force of the antitrust laws. When Penn Water sought and obtained prospective relief by way of declaratory judgment, the defense was not available. Penn Water has therefore been freed by judicial action from the restraints of the illegal contract; the public interest in competition between these two utilities has already been completely expressed. It is another thing altogether to *encourage* the making of illegal bargains by awarding damages to a wrongdoer such as petitioner. It was for this reason that the courts below, which had granted declaratory relief to petitioner, withheld an award of money damages.

The cases which arise under emergency or other legislation enacted to protect a particular class (Petition, p. 18) are not in point here. An example of emergency legislation to protect a class is that relating to housing for veterans (*U. S.* v. *Murtaugh,* 190 F. 2d 407; 4th Cir. 1951;

cited in Petition, p. 18). Another example is that relating to distressed coal producers (*Costanzo Coal Mining Co.* v. *Weirton Steel Co.*, 150 F. 2d 929; 4th Cir. 1945; cert. denied, 326 U. S. 765; cited in Petition, p. 18). Examples of legislation, not necessarily inspired by emergency but to protect a special class from a special type of injury are the "Blue Sky" laws (*Gilchrist* v. *Hatch*, 183 Ind. 371, 106 N. E. 694; 1914; cited in Petition, p. 18). If a member of the protected class participates in a violation of the law, it is under compulsion of the very circumstances for which the law was enacted. The parties would not have equal guilt in such cases. As the District Court remarked in distinguishing such cases when cited by petitioner (1 R. 6):

> "No precedent is to be found in the price control cases exemplified by *U. S.* v. *Murtaugh*, 4 Cir. 190 F. 2d 407. The claimants in those cases were compelled to submit to the illegality by the very emergency which was the reason for the statute. They were *in delicto* but by not means *in pari delicto.*"

In respect of the Sherman Act, there is no special class to which Penn Water belongs but not Consolidated. So far as the antitrust laws are concerned, Penn Water and Consolidated stand as equals.

The judgment below for respondent was not based on any disregard of public policy, as suggested by the petition (p. 3), but on a studied observance of such policy. Thus, the District Court addressed itself particularly to this point (1 R. 5):

> "Legal recourse in these circumstances is not withheld in order to protect the defendant. . . . It is an efficacious means of sustaining the policy of the Congress denouncing illegal restraints in commerce. Illegal trade practices would be encouraged by permitting recovery of their losses.
>
> * * *

> ". . . the public interest is more solicitously stewarded by leaving the private parties where they find themselves. That interest is not affected by the claims for damages. . . . If the parties are left to suffer their own damages, the public is unharmed, the law is enforced, the parties are punished, but redress is still open to any third person injured by their violations. The Court believes too, that non-action would be a greater deterrent to future infractions than the entertainment of claims and counter-claims for damages."

The courts below have conformed in respect of public policy to classic teaching in general and to the teaching of this Court and of lower federal courts for over fifty years.

POINT III.

There was no repudiation of the illegal agreement such as would justify the claim for damages made herein.

The Courts below did not deny that one who repudiates and withdraws from a contract, combination or conspiracy in restraint of trade may—if such contract, combination or conspiracy continues—recover damages for illegal acts committed *after* his repudiation and withdrawal. This was the situation in the "repudiation" cases cited in the petition (pp. 19, 21). It is *not* the situation in the case at bar.

The repudiation in the case at bar came on December 20, 1948 (1 R. 25-30). This was *after* the action by respondent—the letter of November 23, 1948 (1 R. 24-25)—on account of which petitioner sued.

Moreover, on the facts of the case at bar any repudiation by petitioner would have eliminated *ipso facto* the *joint* action between it and respondent—there being only two parties to the agreement—and nothing done thereafter

by respondent could by definition be a violation of the Sherman Act.

The Court of Appeals carefully considered the contention of petitioner that it had repudiated the illegal agreement before it sustained any damages therefrom; the Court of Appeals flatly and unanimously rejected any such contention (2 R. 238, 239; italics ours):

> "The contention is not tenable under the facts of the case. Consolidated's prohibition of the erection of the new plant by Penn Water occurred during the period when both parties recognized the existence and validity of the agreement, and Penn Water's repudiation and suit for a declaratory judgment for the purpose of invalidating the agreement did not occur until *later.*"

The facts as found by the District Court was as follows (1 R. 7; italics ours):

> "The plant expansion damages in the present litigation have their source in unlawful acts committed within the period of pari delicto. The record tells no story of a locus poenitentiae in which the plaintiff reformed but thereafter fell a victim to renewed designs of Consolidated. The antitrust injury to the plaintiff—prevention of the plant expansion—was inflicted at a time, not later than November 1948, when the contracts were valid, subsisting and binding in the minds of both parties. True, the damaging effects of the injury, such as loss by reason of the delay, continued until January, 1951, the date of the avoidance of the two-party contract, but the continuation is attributable to bona fide litigation of the validity of the agreement, a real and substantial controversy. All of such damage flows directly, without supervening cause, from the original injury, the unlawful restraint imposed *before* repudiation of the agreement for its antitrust character."

The facts make it clear that there is no conflict between the case at bar and the "repudiation" cases cited in the

petition (p. 19). In all those cases the illegal scheme continued *after* the withdrawal of the plaintiff. Recovery was permitted on account of acts done by defendant *after* plaintiff's withdrawal; no recovery was permitted on account of acts done by defendant *during* the period of participation by plaintiff.

The inescapable facts show that Penn Water continued as long as possible to seek and to enjoy the benefits to it from the illegal agreement. Penn Water was attempting as late as November 1948 to obtain Consolidated's approval under the agreement of a plant addition for 1951 and thereby to impose on Consolidated responsibility under the agreement for the operating costs of the plant addition and the high rate of return thereon. This was an attempt to gain for Penn Water a selfish advantage under the terms of the illegal agreement. Only when it appeared that the benefits of the agreement might be lost through a rate reduction by the Federal Power Commission, did Penn Water for the first time question the legality of the agreement under the Sherman Act. Any damages now claimed by Penn Water are plainly the direct consequence of its own conduct in voluntarily executing and acting under the two-party illegal agreement. The District Court correctly emphasized this important point (1 R. 7):

> "The antitrust injury to the plaintiff—prevention of the plant expansion—was inflicted at a time, not later than November 1948, when the contracts were valid, subsisting and binding in the minds of both parties. True, the damaging effects of the injury, such as loss by reason of the delay, continued until January, 1951, the date of the avoidance of the two-party contract, but the continuation is attributable to bona fide litigation of the validity of the agreement, a real and substantial controversy. All of such damage flows directly, without supervening cause, from the original injury, the unlawful restraint imposed before repudiation of the agreement for its antitrust character."

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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